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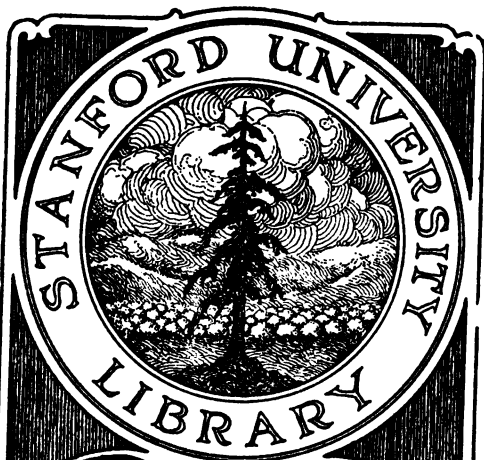
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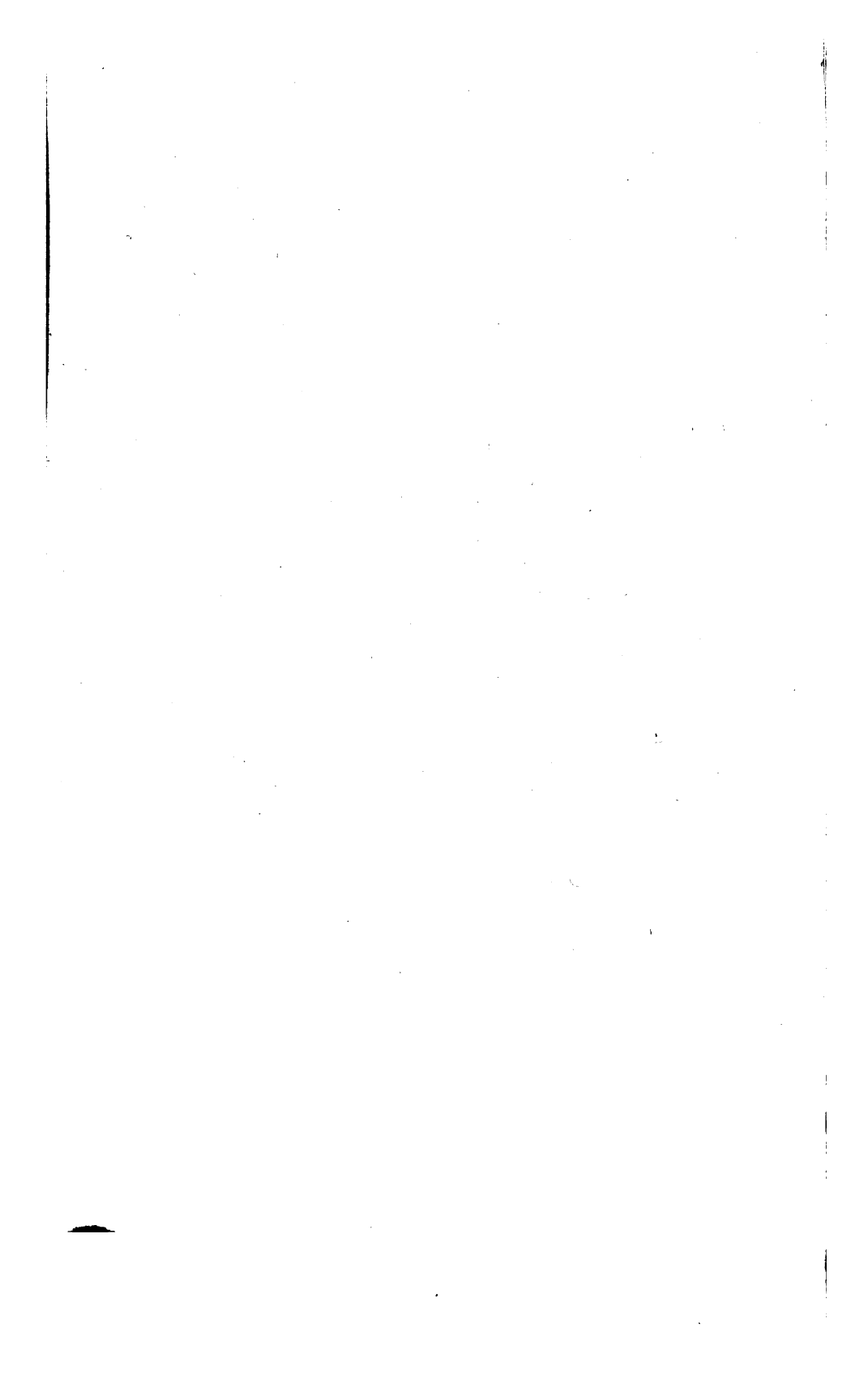


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A
BRIEF VIEW
OF
THE WRIT
Ne Exeat Regno,

WITH PRACTICAL REMARKS UPON IT AS AN
EQUITABLE PROCESS.

BY
JOHN BEAMES, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW. TRANSLATOR OF GLANVILLE, &c.

Inertis est nescire quod sibi liceat.

FIRST AMERICAN EDITION,
With Notes
OF THE RECENT ENGLISH AND AMERICAN DECISIONS:

BY H. W. WARNER, ESQ.
SOLICITOR AND COUNSELLOR IN CHANCERY.

NEW-YORK:
PUBLISHED BY S. GOULD, SIGN OF LORD COKE, CORNER OF WALL
AND BROAD-STREETS.

1821
J. Seymour, printer.

Southern District of New-York, ss.

BE IT REMEMBERED, That on the thirtieth day of April, in the forty-fifth year of the Independence of the United States of America, STEPHEN GOULD, of the said District, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit :

A Brief View of the *Writ Ne Exeat Regno*, with practical remarks upon it as an equitable process. By John Beames, Esq. of Lincoln's Inn, Barrister at Law. Translator of *Glanville*, &c. *Inertis est nescire quod sibi licet*. First American Edition, with Notes of the recent English and American Decisions. By H. W. Warner, Esq. Solicitor and Counsellor in Chancery

In conformity to the Act of the Congress of the United States, entitled "An Act for the encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the time therein mentioned" And also to an Act, entitled "an Act, supplementary to an Act, entitled an Act for the encouragement of Learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

G. L. THOMPSON,
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TO
SIR SAMUEL ROMILLY,

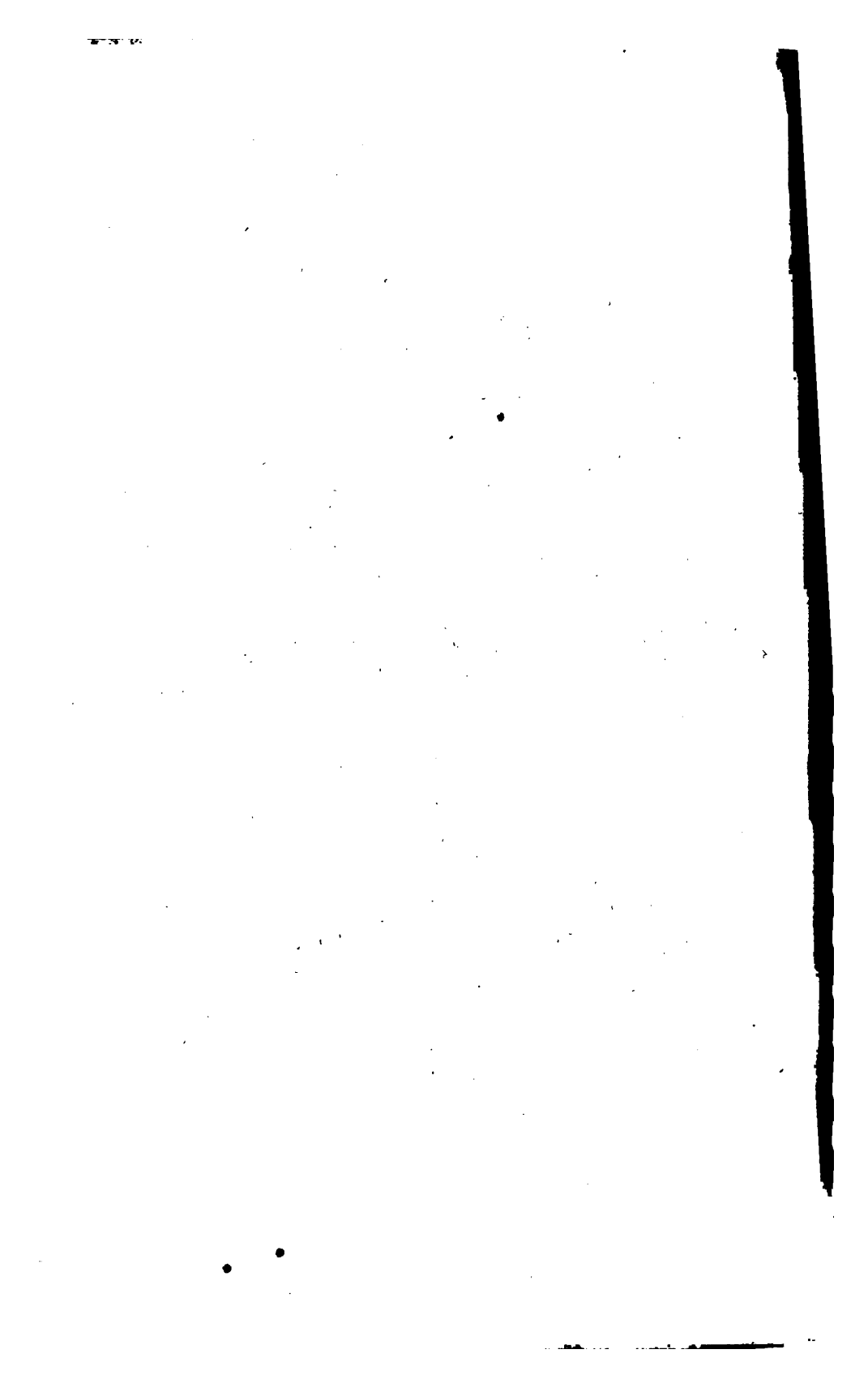
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THIS ATTEMPT TO EXPLAIN A BRANCH OF THE

Practice of that Court,

OF WHICH HE HAS LONG BEEN

THE ORNAMENT.



PREFACE

TO THE

FIRST AMERICAN EDITION.

THE subject of Equity Practice has of late attracted so much attention in some parts of the United States, that the publisher of the present work cannot doubt that he is rendering an acceptable service to the American bar. In New-York, New-Jersey, and South Carolina, particularly, where Courts of Chancery have their just rank in the juridical economy, the advantages of that practice are beginning to be well understood : and in other states, in which there are no distinct tribunals of this kind, there are yet chancery powers and jurisdictions in their courts of law, the correct exercise of which is of the greatest importance.

It is about nine years since Mr. Beames' "Brief View" appeared ; during which time the law concerning the use of the *ne exeat*, as a civil process, has undergone considerable discussion and illustration. Indeed it is itself mostly of modern growth. Until some of the comparatively recent decisions, the subject does not appear to have been justly con-

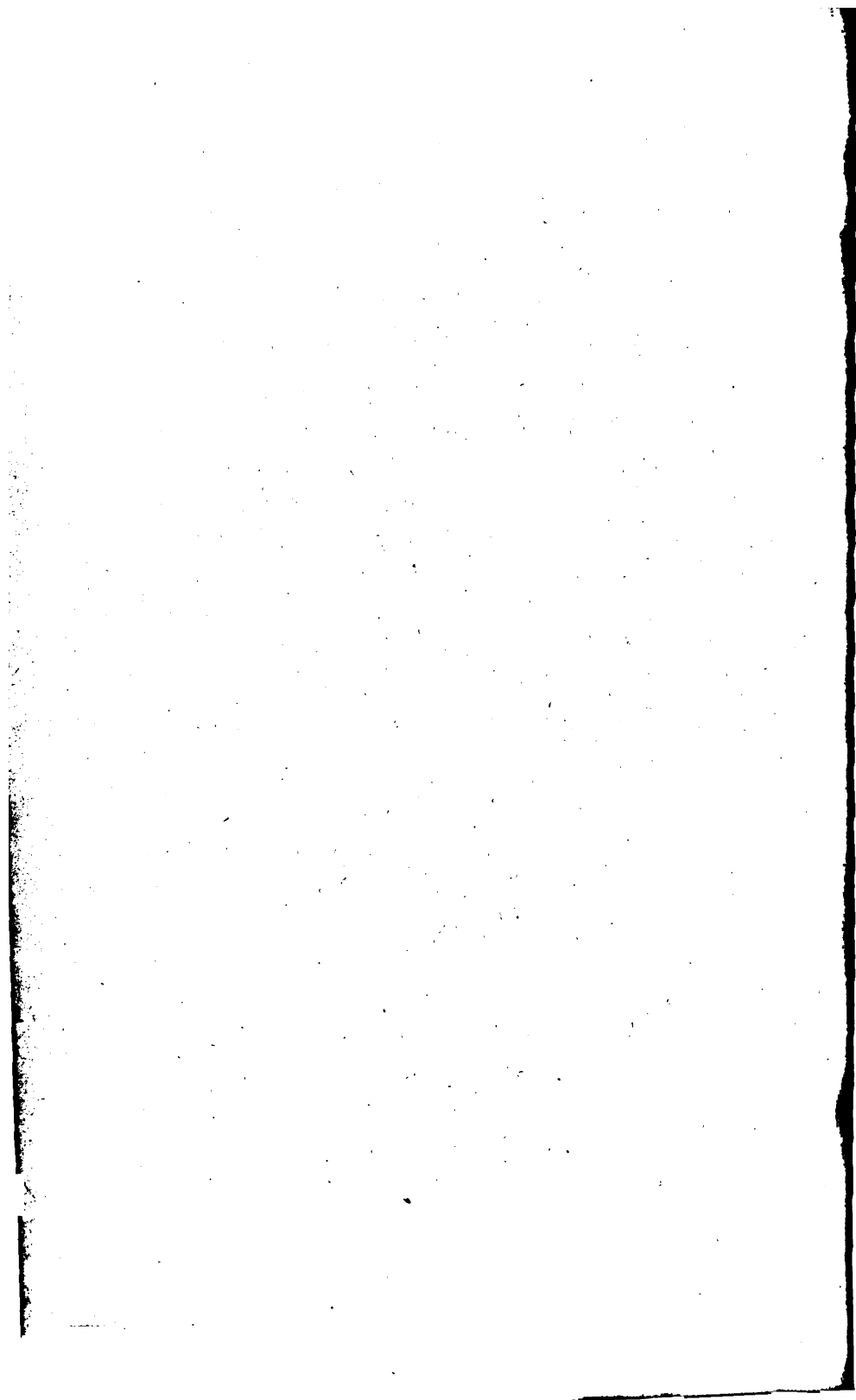
ceived. At one time, the writ was regarded as a high-handed measure of prerogative power ; and in that view, it was seldom resorted to without fear and trembling. There are several instances, and indeed not all of them very ancient, in which it has been granted or refused by the courts, with more apparent consideration of the abuses incidental to the prerogative from which it is said to have been derived, than of its proper end and nature as an instrument of the remedial law.

At present, however, the *ne exeat* is regarded as little more than an order to hold to equitable bail. The party may generally get rid of it by giving security to abide the event of the cause in litigation. It involves no stretch of judicial power ; nor can it be truly said to be more dangerous to the liberty of the citizen, than an injunction, or any other proceeding by which courts either of equity or law constrain men to act contrary to their will, for purposes of civil justice.

Of course, the recent decisions on the subject of this writ, are those of greatest interest to the profession. And the publisher is happy to believe, that all of them, whether English or American, which are of material impor-

tance, will be found in the notes which he has procured to be added to Mr. Beames' work. And he feels a particular satisfaction in remarking, that among them are several which have been determined by that great and distinguished jurist, the present Chancellor of New-York.

NEW-YORK, 27th April, 1821.



ADVERTISEMENT.



IF the Process, which these pages attempt to elucidate, be not very frequently resorted to, it is always applied for under those circumstances of pressing exigency, which necessarily preclude research.

To the Practitioner on the equity sides of the Courts of Chancery and Exchequer, therefore, no apology will, I presume, be thought necessary, for endeavouring to shorten his labour, by bringing together the most important of the printed Cases upon the *Ne exeat Regno*.

There is obviously still less occasion to deprecate censure, for presenting the Public with the few MS. Cases inserted in the following pages. To enable the Reader to appreciate their value, he need only cast his eye upon the name of the Gentleman, to whose liberality I owe them. I had, indeed, indulged the hope, that I should have it in my power, to put the public into possession of many other MS. Cases. But if in this I have been disappointed, it is more, perhaps, to be imputed to the lateness of my applications, than to any reluctance on the part of

the Gentlemen, to whom those applications were made, to afford every possible communication.

On the contrary, it is but justice to them to declare, that I have experienced that liberal conduct on their part, which renders me their Debtor.

I am also indebted to another source. To mention that source would subject me to the imputation of gross vanity, whilst it could add nothing to the well-earned fame of a man great, indeed, as an Advocate, a Senator, and a Legislator; but not less great for that enlarged liberality of sentiment, which induces him to bestow an approving smile upon an endeavour to be useful, when the correctness of his judgment must tell him, the execution of it is most crude and imperfect.

It remains to state the order, in which the subject of the following pages has been treated.

The *first* Chapter^a is employed in endeavouring to give the Reader a clear view of the nature of the Writ *Ne exeat Regno*.

The *second* Chapter^b attempts to state the doctrine of the Courts of Equity in the present day with regard to the Writ, in which the various in-

^a Commencing page 1.

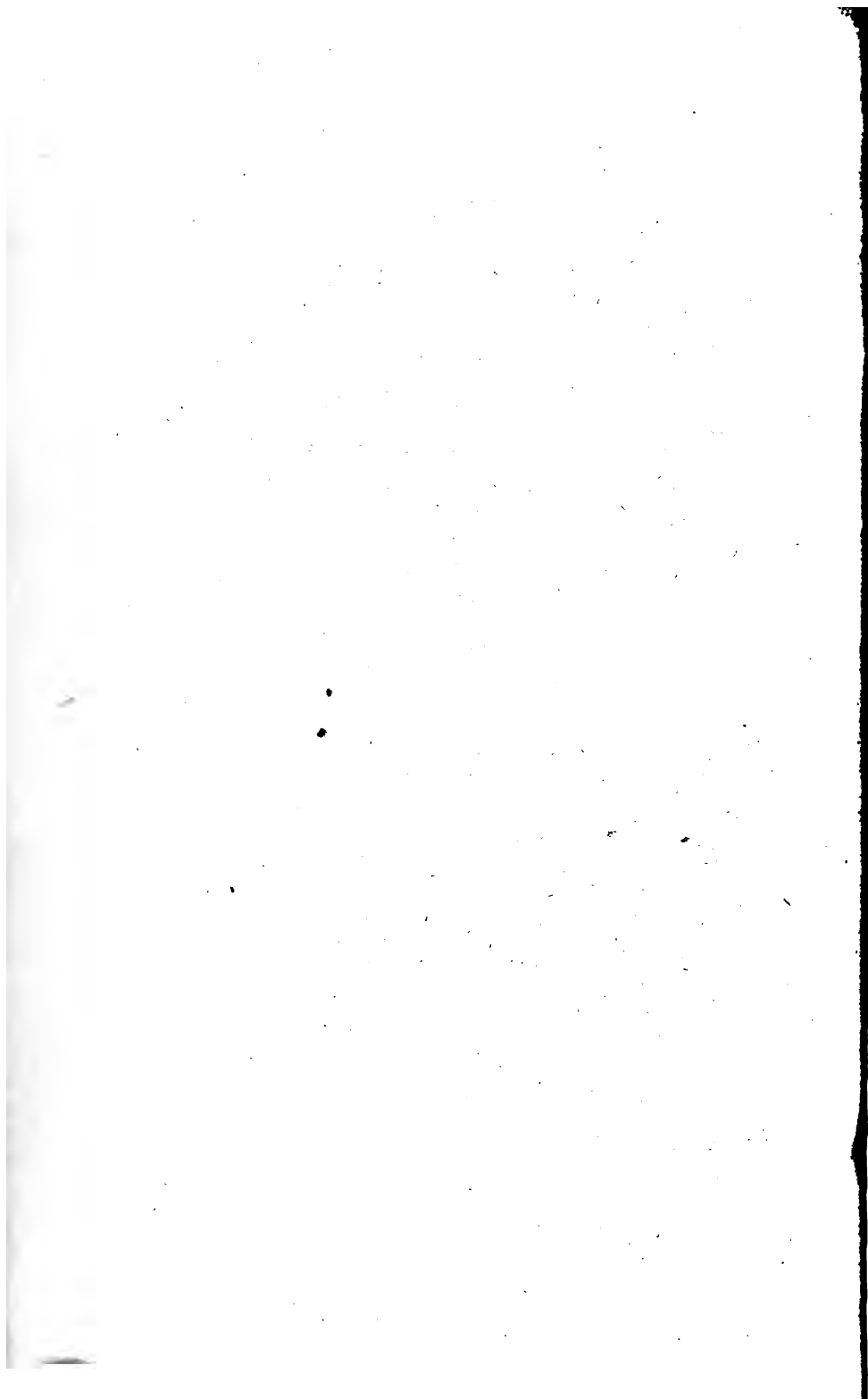
^b Commencing page 21.

stances of granting or refusing the Writ are discussed.

The *third* Chapter^c is confined to such practical remarks and references, as will, it is hoped, enable the practitioner to act on the spur of the moment with less hesitation and doubt.

J. B.

c Commencing page 62.



CHAPTER I.

THE Writ of *Ne exeat Regno*, or, as it has sometimes been termed, *Ne exeat Regnum*, issues, as its name imports, to prevent a person from leaving the Realm.

It appears to have been unknown to the ancient Common law, which in the freedom of its spirit, allowed every man to depart the Realm at his own pleasure.

In tracing the first instance, in which this privilege was encroached upon, some writers have ascended so high as the reign of William Rufus—*Publico Edicto vetuit unumquemque sine commatu suo ex Angliâ egredi.*^a But the learned Selden seems to consider this Edict as more particularly applicable to Anselm, the result of his researches not having ascertained that it was *of general force.^b It seems far more probable, that we are to look for the first instance, in which this privilege was broken in upon, to the Constitutions of

a Vide Seldeni Opera Omnia, fol. 1005.

b Seldeni Opera Omnia, fol. 1005.

Clarendon, passed in the 10th year of Henry the Second's reign, which extended, however, to the Ecclesiastics only, and rendered it unlawful for them to quit the Realm without the King's License. To prove that they applied to the Clergy alone, it is merely necessary to recur to the words of the Constitutions—*Archiepiscopis, Episcopis, et Personis Regni, non licet exire Regnum absque licentia Domini Regis.*^c In no other light then as an exception to the generality of the Rule, can this be considered. Had it been unlawful for *all* persons to depart the Realm, without the King's License, it could hardly have been necessary to declare, that a particular description of persons, namely, the Clergy, should not ; and, as the provision itself arose from a jealousy of the intercourse between the Ecclesiastical Body and the Papal See, the restraint was not extended beyond that object. That this was really the fact may very fairly be inferred, since we find the privilege enjoyed by the people in general so unequivocally recognised,* not merely in the Articles which preceded the Magna Charta of King John, but also in that invaluable Relic itself. In the Articles it is thus stated : *Ut liceat unicuique exire de regno et redire, salva fide Domini Regis, nisi tempore Werre, per aliquod breve tempus, propter communem utilitatem Regni.*^d But in the Charter itself of King John it is

c Vide Leg. Anglo-Saxon. Ed. Wilkins, p. 321—323.—

3 Inst. 178, and Seldeni Op. Omn. 1011.

d Blackst. Ed. of Mag. Car. Art. 33.

thus set forth: *Liceat unicuique de cetero exire de Regno nostro, et redire salvo et secure per terram et per aquam, salva fide nostra, nisi tempore guerre, per aliquod breve tempus, propter communem utilitatem Regni, exceptis inprisonatis, et utlagatis secundum legem Regni et gente de terra contra nos guerrina et mercatoribus de quibus fiat sicut predictum.**

It cannot, however be concealed, that this privilege is omitted in the Great Charter of Henry the Third. But, if any inference is to be drawn from that omission, it is clearly one in favour of the privilege, which was too important to be passed over in silence, had it not been unreservedly acquiesced in and admitted by the Advocates for Prerogative. In this view, it would have been absurd to introduce it into a *Charter which had for its object the settling disputed, or, at least, frequently violated rights.

However that may be, the privilege appears to have been materially encroached upon, in the period which elapsed between the *Magna Charta* of King John, and the reign of Edward the First. I use the terms *encroached upon*, because I am not aware, that any legislative sanction can be adduced in support of the alteration. But, whether any such can or cannot be produced, we proceed to consider the Law as laid down by two eminent writers, who flourished in the reign of Edward the

e Blackst. Ed. of Mag. Car. Art. 42.

First. Fleta, *having been led by his subject to speak of the Essoin, *de ultra mare*, informs us, that if upon any other occasion, than one which he had previously mentioned, any person should desire to quit the kingdom, that such person would act wrongly or unadvisedly, (*inconsultè*,) unless he had previously obtained the King's License.^f Britton again, in delivering his Law from the mouth of the first Edward, lays it down, that "no great Lord "or Knight of our Realm ought to go beyond the "seas, without our leave ; for *by that means the "kingdom might be left destitute of persons of "prowess."^g

It will be remarked, that Britton, who composed his work a few years only posterior to the time when Fleta wrote, lays down the Law in terms far less general, than those made use of by his predecessor, confining it, in fact, to the great Lords and Knights. Had the restraint mentioned by Fleta and Britton been temporary, and confined merely to a period of war, it might possibly have been reconciled by, as it would have fallen within the terms of, the Exception to the Rule, which the Articles and Charter of John, in

^f Fleta, 383, s. 1, 2.

^g Britton, c. 123. Mr. J. Blackstone, in extending Britton's doctrine to Archers and Artificers, appears to have mistaken it. (1 Comm. 268.)

I speak with particular allusion to the chapter of Britton which has been cited.

(*5)

laying down the Rule, expressly recognise.^h Possibly, indeed, the casuists of those times would have attempted to reconcile us to it by contending, that this restraint upon the liberty of the subject, which compelled him to *obtain the King's License before he presumed to quit the kingdom, was for the common good, and therefore, was authorized by an equitable construction of the words *propter communem utilitatem*,—a construction differing but little in substance from that which Lord Coke is inclined to put upon the Writs we shall presently have occasion to mention, which were framed for the purpose of enforcing this invidious branch of the Prerogative.ⁱ With every deference, however, to that great name, it is much shorter, and, perhaps, more probable to conclude, that the strong arm of the Prerogative had in this, as in a thousand other instances, been too powerful for the liberty of the subject.

If, however, the Law really was as it is represented by Britton to have been in the reign of Edward the First, it again underwent an essential alteration in the time of Richard the Second, when an Act was passed forbidding all persons whatever to go abroad, “excepting only the Lords

^h I am aware that the Magna Charta of John is not in our Statute Book : but I do not perceive that the necessary inference to be drawn from that circumstance is, that we are not to appeal to it as a statute, or, at least, a Record declaratory of the state of the constitution at a given period.

ⁱ 2 Inst. 54.

(*6)

“and other Great Men of the Realm, and true
 “and notable merchants, and the King’s soldiers.”^k
 But, if this statute of Richard altered the Law, it
 seems a tacit proof, *that the people in general
 had been considered to possess the right of leav-
 ing the Realm at their pleasure. If this had not
 been the impression of the Legislature at the time
 of enacting it, where would have been the occa-
 sion for passing this act? This statute, therefore,
 presuming the law was as Britton states it, took
 the restraint from off the shoulders of the Barons
 and Knights, Merchants and Soldiers, and placed
 it upon those of the people in general. If the
 former restraints originated from political motives,
 the Statute of Richard the Second was intended
 to prevent the carrying of gold, silver, or jewels
 out of the country, and adopted this mode of ef-
 fecting his object.^l This change in the legisla-
 tive ideas of the times, now prohibiting the Great
 Men, then, permitting them to quit the Realm,
 will not appear remarkable to those acquainted
 with the legal history of that age.

In all the successive alterations which the
 Rule appears to have sustained by the Constitu-
 tions of Clarendon—the pages of Fleta and Brit-
 ton, and the Statute of Richard the Second, one
 cannot but perceive, that the Prerogative was
 clearly the gainer. If its convenience alone was

^k 5 R. 2, c. 2, s. 6, 7.

^l Vide the statute itself.—Also Barr. Obs. on Anc. Stat.
 p. 319.

*on all occasions suffered to dictate the alteration, so its power was virtually admitted, in being allowed to qualify the Rule at its pleasure, and to shape it in a manner the best adapted to answer its own purposes. The result of the different fluctuations, which the Rule itself sustained, seems to have been the settled notion or proposition, which we find so repeatedly reiterated from one Law-writer to another, namely, that no person whatever, let his rank or station be what it might, if he were a subject, possessed a right of quitting the Realm, without the King's License previously obtained ; a notion extremely difficult to reconcile with the exception in the Statute of Richard the Second, and certainly still more difficult to reconcile to the constitution as recognised or established by the Magna Charta of King John. To enforce these different regulations in restraint of that liberty which the subject enjoyed under the milder sway of the ancient Common Law, the *Natura Brevium* gives us the forms of two writs. The first having for the object of its restraint a Clergyman, is directed to the Sheriff,^m commanding him to take security from the party not to depart† the Realm, without the King's License ; and, in case of refusal, to commit the party to prison.ⁿ The other Writ, having

^m Sometimes it was directed to Justices of the Peace : sometimes to the Sheriff and Justices of the Peace. F. N. B. 190—2 Inst. 54.—Pract. Reg. 289. (Ed. Wyatt.)

ⁿ Fitz. Nat. Brev. 188, from whence is extracted the form of this writ inserted in the Appendix at the end of this pamphlet. (No. 1.)

for the object of its restraint a Layman, differs from the former, in two respects chiefly : it requires no security to be taken from the party, and is directed to the party himself : but it coincides with the other Writ, in having for its object the preventing the party from leaving the Realm, without the King's License.*

These Writs appear to be in substance Writs of *Ne exeat Regno*, though not known to ancient authors by that name. They may both be considered as the same Writ, differently modified, as applying to different persons, Clergymen, or Laymen. Fitzherbert accordingly treats of both under the same head or title—the Writ *de securitate invenienda quod se non divertat ad partes externas sine licentia Regis*,^p by which title the Writ was anciently known.

*But of these Writs, that which applies to a Layman is, I apprehend obsolete in practice,^q whilst that which relates to a Clergyman appears to be the prototype of the Writ which, in modern times, has been known by the name of *Ne exeat Regno*, as these two Writs did not at one period differ in terms ; the instances, indeed, in which

^o Fitz. Nat. Brev. 188.—3 Inst. 178.—The granting of these licenses was no doubt a fruitful source of revenue. See the appendix (No 2.) for the form of the writ referred to in the text, as extracted from Fitzherbert.

^p F. N. B. ubi supra.

^q See Bernal v. Marq. of Donegal, 11 Ves. 45. Mr. Fonblanque's Argument.

they now differ, I shall have occasion presently to notice. Sir Edward Coke informs us, that the Writ, so applying to an Ecclesiastic, was expressly founded on the Constitutions of Clarendon, which, as we have already had occasion to remark, related in this respect to the Clergy only.* If Sir Edward Coke's assertion be correct, it follows, that the *Magna Charta* of John was by some course of reasoning, which it would at this distance of time be difficult to discover, considered as not repealing or affecting the Constitutions of Clarendon.

But, leaving this point in the obscurity with which it is enveloped, how it has happened that a process, originally adapted to the clerical body alone, and framed to prevent too strict an intercourse between that body and the Papal See, should, of all others, be the one in modern times selected in order to prevent Debtors escaping from their Creditors, can be no otherwise accounted for, than by its previously existing as a prohibitory process, and being found admirably adapted to that end.

The two Writs *de securitate inveniendæ*, are founded upon the same political pretence. Whether that pretence was introduced into the Writ, when applied to a Clergyman, in allusion to the Constitutions of Clarendon, and was afterwards copied from it into the same Writ, when directed to a Layman—whether it was, when introduced into

r 3 Inst. 178.

the latter Writ, founded upon what may be termed the Exception to the Rule of *Magna Charta*, or upon the Statute of Richard the Second, or any other Statute now lost, or was a mere pretence, by which the Prerogative condescended to justify a stretch of its power, I leave to the more learned reader to determine. The political pretence to which we allude, consituting the introductory part of the Writ *de securitate inveniendæ* is couched in these terms : *Quod datum est nobis intelligi quod tu versus partes externas absque licentia nostra clandestine te divertere, et quamplurima nobis et coronæ nostræ *prejudicialia ibidem prosequi intendas, &c.*^s Upon which Lord Coke, as if by way of qualifying his general doctrine, observes, “so as neither this Writ, nor a “proclamation in nature of this Writ, ought to be “granted, but where the party intends to depart “the Realm for these ends.”^t This was a material qualification of the rigour of the prohibition, and might possibly have been sometimes resorted

^s The words in the text are extracted from the Writ directed to a Layman, which in this respect scarcely differs from that relating to a Clergyman, as the reader will perceive on turning to the forms in the Appendix.

^t 3 Inst. 178. Dyer, however, does not scruple to assert, that the cause of departing the Realm was not traversable by the subject ; (Dyer, 165, b.) in which doctrine, Fleming, C. B. appears to have coincided ; (Lane 29.) and we find the Counsel in another instance asserting the same position. (Nailor's Case, 12 Mod. 562.) Previously, indeed, to the Repeal of the Statute of Richard the Second, there might have been some reason for so contending, as against those persons who fell not within the exception.—See also Harg. Law Tr. 91.

(*12)

to, previously to the Statute passed in the fourth year of the reign of James the First," which repealed the Act of Richard the Second, and, consequently, left the matter upon the footing it stood previously to the enacting of the latter Statute.

*In this cursory sketch, I have not mentioned the two Statutes of Elizabeth. I allude to the 13th of Elizabeth, c. 3, which imposed certain forfeitures upon every one who departed the Realm without the Queen's License, or did not return within six months after warning by Proclamation; and the 14th of Elizabeth, c. 6, which invested the Queen with additional power over the property of such offenders. Many cases in Dyer and the cotemporary Reporters turn upon these Statutes, which Manhood, C. J. does not hesitate to assert, but with what reason the reader must be left to himself to decide, were made in affirmance of the Common Law.^v

But, as these acts were temporary only, I shall not burthen my subject with any thing more than this brief allusion to them.

Neither shall I detain the reader with discussing certain other statutes, which are of yet more

^u 4 Jac. 1, c. 1. s. 22.*

* Vide Harg. Law Tr. p. 92.

^v Knowles v. Luce, Moor, 109.

particular application, and have no general connexion with our subject."

Nor shall I trespass upon his patience by investigating, how far the king can by his general or special proclamation, or otherwise, inhibit the subject from going out of the Realm during the time of Peace, or recall him when absent. Innumerable are the *dicta* upon this point, which, as irrelative to the subject more immediately under discussion, I may be pardoned for passing over in silence.* It is sufficient that the Books admit, that until such Proclamation made, or the writ *Ne exeat Regno*, issued, any person may go beyond sea.†

From what we have said it will naturally, we presume, be inferred, that the writ *de securitate in-*

w 12 R. 2, c. 15.—1 Jac. 1. c. 4 —3 Jac. 1. c. 5.—
3 Car. 1. c. 2, &c &c.

x Fitz. Nat. Brev. 188.—3 Inst. 178.—1 Bl. Comm. 266.—Dyer 165. b —Knowles v. Luce, Moor 109.—Lord Bacon's Tracts p. 180.—Sands v. Childs, 4 Mod. 176. &c. &c. &c.

y Fitz. Nat. Brev. ubi supra.—Dyer 295. b. The case in Dyer, when compared with the pliant and accommodating principles of that age, is rather remarkable for its doctrine, namely, that departing the Realm without License, solely with an intent to live out and free of the Laws, was no offence, unless there had been express restraint by Writ or Proclamation—"for it is a thing indifferent to depart the Kingdom, and the purpose and cause which is secret in the heart, is not examinable. See the Writ in Nat. Brev. Fitz. in writ *de securitate invenienda*; and to prove the Common Law to be as above, the general prohibition or defending of Richard the Second against going out of the Realm, except great men."

(*14)

venienda, whether relating to a Layman or a *Clergyman, was a *political* writ. In this, its essential feature, it differed *in substance* from the writ *Ne exeat Regno*, which is purely a *civil* Writ, and resorted to when the object is to prevent a party from withdrawing himself out of the kingdom, to the delay, or eventually to the injury of an honest Creditor. It differed also *in form* from the last mentioned writ, in being founded upon the political pretence that the party withdrew himself for treasonable purposes, whilst the *Ne exeat Regno* contents itself with the allegation, that the Defendant is greatly indebted to the complainant, and designs to go into parts beyond the Sea, which tends to the great prejudice and damage of the complainant.^z With this difference in form, the writ *de securitate invenienda* when relating to a Clergyman, and the writ *Ne exeat Regno* bear, even now, a certain resemblance, and they formerly bore a †perfect resemblance to each other. This may account for the circumstance, that authors frequently speak of them as one and the same identical Writ. When the substantial difference which has always subsisted between them is recollected,

z I speak with reference to the form in which the *Ne exeat Regno* at present issues, since the *Praxis Almæ Curie Cancellariæ* gives us a form of this Writ word for word, the same as the Writ *de Securitate invenienda*. (1 Prax Alm. 135.) That the form in which the *Ne exeat Regno* issued was, and that for a considerable period, and until very lately, such as exhibited in the *Praxis Cancellariæ* will be very evident to the Reader, if he will give himself the trouble of attending to the terms in which the writ is continually spoken of in the older Books, Dyer, Coke, Fitzherbert, &c. &c.

(*15) (†16)

it should seem, that it was never very accurate to treat them as the same Writ. It is still less so in the present day, when, to the difference in substance, there is added a considerable variation in form. (1)

If, however, these two Writs be considered as one and the same, it is not easy to fix the period when the Writ *de securitate inveniendâ* assumed the name of *Ne exeat Regno*, and was, under that appellation, first applied to Civil purposes. Tothill, indeed, mentions an instance of the application of it "at the suit of Men, in Suit between Party and "Party," in the case of *Welby v. Welby*, which occurred in the 19th of James the First; and he refers to another instance, in the Case of *Hasell v. Badick*, which happened so early as the 32 year of Queen Elizabeth.* But Lord Bacon seems to point to a still more distant date in that Ordinance, where he distinguishes between the proper application of the Writ to *political purposes, and the improper, technically speaking, but yet perhaps far more just application of it, which had arisen for Civil purposes. The Ordinance to which we allude is couched in the following terms :—"Writs of *Ne exeat Regno* are properly to "be granted, according to the suggestion of the

a Tothill's Transactions, fo. 233.

(1) So striking is the difference here referred to, that even the history of the *ne exeat*, when regarded as an instrument of the remedial law, seems to call for very little consideration of that original prerogative of the British crown, of which the author has hitherto treated : and in point of principle, certainly, the two things are wholly distinct.

“Writ, in respect of attempts prejudicial to the King and State: (in which case the Lord Chancellor will grant them upon prayer of any of the principal Secretaries, without showing cause, or upon such information as his Lordship shall think of weight,) but otherwise they may be granted, *according as of long time used*, in the case of Interlopers in Trade, great Bankrupts in whose Estates many Subjects are interested, or other cases that concern Multitudes of the King’s Subjects; also in case of Duels, and divers others.”^b

But, whatever may be the period when the Writ *Ne exeat Regno* was first applied to Civil purposes, it must be conceded, that it could not be so done, under colour or authority of any of the Statutory regulations which we have had occasion to mention, since none of those regulations* either related to or affected it. Neither will it be easy, if indeed it be possible, to prove that it is sanctioned by any other Act of Parliament.^c

It appears to rest simply and solely upon what Lord Bacon has very judiciously placed it—its force is derived from the circumstance that it has been “of long time used.” It is upon this its true ground rested by Lord C. Eldon. “The application of this high prerogative Writ,” says his Lordship, “to these purposes can only be justified

^b Bacon’s Ordinances, No. 89.

^c Vide the Argument in the case of the Company of Merchant Adventurers against Rebow. 3 Mod. 127.

“by usage and practice. If they will not warrant it under such circumstances, I do not know upon what it is to stand.”⁽²⁾ If this be conceded, it follows of necessity, that it is highly important to know the instances in which it has been used; and being in possession of them, it seems an indisputable consequence, that we shall have ascertained the full extent to which the Writ can constitutionally be employed. We hasten, therefore, to the consideration of those instances in which the Writ has been granted by the Court of Chancery,* and those in which it has been refused, with certain other points which naturally arise. But previously to our entering upon this discussion, it may be proper, to put the Reader into possession of the Writ *Ne exeat Regno* which is subjoined.

“George the Third, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, &c. To our Sheriff of Middlesex, greeting. Whereas, it is represented to us in our Chancery, on the part of A. B. complainant, against C. D. Defendant, (among other things,) that he the said defendant is greatly indebted to the said complainant, and designs quickly to go into parts beyond the Seas, (as by oath made on that behalf appears,) which tends

d *Etches v. Lance*, 7 Ves. 417.—See also *Jackson v. Petrie*, 10 Ves. 166. and *Ex parte Bruncker*, 3 P. Wms. 312.

(2) The use of this writ has not prevailed extensively in the United States. In those parts of the Union where equity courts have been separately organized, it has been occasionally resorted to; and the practice here rests upon the same foundation as in England.

(*19)

"to the great prejudice and damage of the said
 "complainant. Therefore, in order to prevent
 "this injustice, we do hereby command you, that
 "you do, without delay, cause the said C. D. per-
 "sonally to come before you, and give sufficient
 "bail or security in the Sum of £ that the
 "said C. D. will not go, or attempt to go, into parts
 "beyond the seas, without leave of our said
 "Court; and in case the said C. D. shall refuse to
 "give such Bail or Security, then you are to com-
 "mit him the said C. D. *to our next prison, there
 "to be kept in safe custody, until he shall do it of
 "his own accord; and, when you shall have taken
 "such security, you are forthwith to make and re-
 "turn a Certificate thereof to us in our said Court
 "of Chancery distinctly and plainly, under your
 "Seal, together with this Writ. Witness Ourselves
 "at Westminster, the day of in
 "the year of our reign."* (3)

e Harrison's Pract. of the Co. of Chancery, p. 537. (Ed.
 Newland.)—Hind, p. 613.

(3) This form is so easily adapted to American practice, that it is thought
 needless to subjoin an example, with the requisite alterations for that pur-
 pose.

(*20)

CHAPTER II.

THIS writ, when granted on behalf of a Subject, seems formerly to have been considered a Writ of Grace, and as we are told, it “used to be granted at the mere pleasure of the Court, on affidavit, or other matter, showing the party designed to go out of the Realm to the other party’s damage.”^a

“It is said, however, to have been settled by the Lord Keeper Wright, that it being a remedial Writ, is, as such, upon due application by petition, or motion, to be granted the subject.”^b

Conformably to this doctrine, the Court formerly granted the Writ, without any Bill having *been previously filed.^c But it is now, I apprehend,

a Practical Reg. (Ed. Wyatt) p. 289.

b Ibid. 289.

c Loyd v. Cardy, Prec. Ch. 171—Anon. Ca. cited in ex parte Bruncker, 3 P. Wms. 312, and see note K. there.—See also Registers statement in Roddam v. Hetherington, 5 Ves. 92.

clearly settled, that this writ cannot be granted, except on a Bill previously filed.⁴ (4)

The application for this Writ must, generally speaking, be supported by an Affidavit swearing positively to the Debt;* and one Case has gone so far as to lay it down that the Affidavit "must also mention the facts on which the Debt arises, and on which it is grounded." Nor will the Court be disposed to relax this rule, on account of any difficulty the party may feel in complying with it; for in a recent case we find the Court observing, that, "however great the difficulty upon the Plaintiff, generated by circumstances which would have great weight *at the hearing, to make the Affidavit as precise and pointed as the Rules of the Court require, that is his misfortune; and I can no more grant this Writ on account of that difficulty, than a Judge can order Bail upon an insufficient Affidavit. The Affidavit must be as

d *Ex parte Bruncker*, 3 P. Wms. 312.—But see the Registers statement in *Roddam v. Hetherington*, ubi supra.

e *Rico v. Gualtier*, 3 Atk. 501.—*Anon.* 2 Ves. Sen. 489, —*Shearman v. Shearman*, 3 Bro. 370.—*Roddam v. Hetherington*, 5 Ves. 91.—*Jackson v. Petrie*, 10 Ves. 164.—As to the Affidavit, the Plaintiff, by a standing order in Lord Cowper's time, is to make oath of his debt. *Harrison's Pract.* in Ch. 537. (Ed. Newland.) *Hind.* 611. Note x.

f *Anon.* 2 Ves. Sen. 489.

4 "The settled rule is, that the writ cannot be granted on petition and motion without a bill previously filed."

Mattocks v. Tremain, 3 John's Ch. Rep. 75.

And yet it does not appear from this case that the rule is considered as absolutely inflexible.

(*23)

“positive as to the equitable Debt, as an Affidavit of a legal Debt to hold to Bail.”^g

To this Rule, one exception, and one exception I apprehend only, has been allowed, and that is in a Bill for an account, where it has been held sufficient, if the Plaintiff swear to the Balance *as to his belief*.^h It should, however, be observed, that in a very recent case Lord C. Eldon is represented as observing, “the practice, that stating belief of the Balance of the account is sufficient, is as old as Lord Hardwicke’s time; but in future I shall pause upon that, unless facts or declarations, as the ground of that belief, are stated.”ⁱ (5)

*In addition to swearing positively to the Debt, the Court requires, when the Bill is against an

g *Jackson v. Petrie*, 10 Ves. 165.

h *Rico v. Gualtier*, 3 Atk. 501.—*Jackson v. Petrie*, 40 Ves. 165.—See also *Jones v. Sampson*, 8 Ves. 593.—Lord Grey v. Jones, there cited.—*Amsinck v. Barclay*, 8 Ves. 597.

i *Amsinck v. Barclay*, ubi supra.

5 Various questions, arising upon matters of account, may greatly affect the balance, when they come to be decided. Hence, the *belief* of the party, declared in his own favour, is not always a safe criterion of the amount. In a case, where the account was represented to have proceeded from an adventure in maritime trade, Lord C. Eldon required the plaintiff to add to his affidavit of belief respecting the balance due, a further statement that he believed the trade and the transactions of the adventure to have been lawful.

Dick v. Swinton, 1 Ves. and B. Rep. 371.

And in a case before cited, which was marked with some peculiar circumstances, Mr. C. Kent, after noticing the doubt expressed by Lord Eldon in *Amsinck v. Barclay*, held the mere belief of the party to be insufficient to justify a *re exeat*.

Mallocks v. Tremain, 3 Johns. Ch. R. 75.

Administrator, that the plaintiff should swear, either positively or to the best of his knowledge or belief, that Assets had come to the Defendant's hands, "because the demand arises in *auter droit*; "otherwise it would be holding one who would "not be held to Bail at Law, and would detain a "person here whom they had no right to detain, "the demand arising in *auter droit*."

It is also required, that the Affidavit on which the application for this Writ is founded, should show, that the defendant intends going abroad. It seems formerly to have been thought, that the Affidavit was in this respect sufficient if it merely stated a belief of the defendant's intention to quit the Kingdom, without going into the circumstances upon which that belief was founded.¹ But the extreme vagueness of that Rule has been, and that very properly, qualified by later decisions; and it is now held, that the Affidavit to obtain this Writ, must be positive *as to the Defendant's intention to go abroad, or to his threats or declarations to that effect, or to facts evincing it.^m In *Oldham v. Oldham*, the Court addressing itself

k Anon. 2 Ves. Sen. 489.—See also *Jones v. Alphenin*, 16 Ves. 471.

l *Russel v. Asby*, 5 Ves. 96.—See also *Chapeauvogue v. Carteaux*, in a note to *Amsinck v. Barclay*, 8 Ves. 597.

m *Oldham v. Oldham*, 7 Ves. 410.—*Etches v. Lance*, 7 Ves. 417.—*Amsinck v. Barclay*, 8 Ves. 597.—*Hannay v. M'Entire*, 11 Ves 54.—*Jones v. Alphenin*, 16 Ves. 470.—See also *Taylor v. Leitch*, 1 Dick. 380. and *Shearman v. Shearman*, 3 Bro. 370.

particularly to the point of declarations, observed, "it is not sufficient to show that another person "said so." Before I quit this part of our subject I shall put the Reader in possession of Lord C. Eldon's Judgment in the case of *Percy v. Powel*, for a very valuable note of which I am indebted to the obliging liberality of Mr. Bell. "I think," says his Lordship, "this affidavit is not sufficient: "Mr. Percy does not swear to any threat to go "abroad; he only swears to his information and "belief, and upon that information, according to "the fair construction of the affidavit, he founds "his *belief*, that the Defendant is going abroad. "The whole, therefore, depends on his informa- "tion, which may be true or false: he gives no "reason why the party giving him the informa- "tion who is not named, does not join in the "affidavit, which that party ought *to do." It is "consistent with this affidavit that he may have his "information from Grace Powell, the wife of the "Defendant; if that is the case, as it has been "determined,^o that a wife's affidavit cannot be "read to support this sort of application against "the Husband, it is impossible, that another per- "son's affidavit can be sufficient, founding belief "on her information without her affidavit."^p (6)

n See *Hannay v. M'Entire*, ubi supra.

o Vide *Infra*, the Case of *Sedgwick v. Walkins*, &c.

p From Mr. Bell's MS.

(6) "There ought to be a positive affidavit of a threat or purpose to go abroad." *Matlocks v. Tremain*, *ut supra*.

(*26)

The Practical Register informs us^q that, “this Writ is now mostly used where a suit is commenced in the Court against a Man, and he designs to defeat the other of his just demand, or to avoid the Justice and Equity of this Court, is about to go beyond Sea, or, however, that the Duty will be endangered if he goes.” This naturally brings us to the consideration, how far it is necessary for the affidavit to allege, that the Defendant intends going abroad to avoid the Jurisdiction, or that the Debt will be endangered by his quitting the Kingdom; questions which have been more than once under discussion. In one instance Mr. *Scott moved the Court to discharge an order for a *Ne exeat Regno*, on the ground that the Affidavit, on which it had issued, did not go so far as to swear the Plaintiff would be in danger of losing his Claim by the Defendant’s leaving the Kingdom; but Lord C. Thurlow said, “that it might have been stronger if the Plaintiff had sworn he would be in danger of losing his claim; yet, as the Bill was brought for the demand, the Defendant’s quitting the Kingdom, whereby the Court lost its Jurisdiction, was a strong implication, that it was with a view to avoid it,” and therefore denied the Motion.^r In two subsequent

q Page 289.

r The Reporter must have mistaken the authorities cited, which do not appear to be in point.

s Baker v. Haily, 2 Dick. 633.

Cases^t the question was again agitated, but what is rather surprising, the Case of *Baker v. Haily* does not appear to have, on either occasion, occurred to the Court. The Case of *Etches v. Lance* stood over, that precedents might be searched; and the result of the examination being, that it was settled since the time of Lord Hardwicke, that it is sufficient if the Affidavit alleges that the Plaintiff will be in danger of losing the Debt, the *Writ was granted. This doctrine was again acted upon in *Tomlinson v. Harrison*; and it may, therefore, be considered as settled, that the Affidavit will be sufficient, if it state that the Debt will be endangered by the Defendant's quitting the kingdom. (7)

Before we dismiss the discussion of the Affidavit, upon which this Writ issues, it may not be improper to notice a few other points immediately connected with it.

In one case, it appeared, that the Affidavit, upon which the Application for the Writ was grounded, was sworn in *Ireland* before a Master. Lord Thurlow doubted, at first, the admissibility of the Affidavit. But, having afterwards, as he said, conferred with the judges, he admitted the Affidavit to be read.^u

^t *Etches v. Lance*, 7 Ves. 417. and *Tomlinson v. Harrison*, 8 Ves. 33.

^u *Johnson v. Smith*, 2 Dick. 592. (Wyatt's Ed.)

(7) To the like effect, *Mattocks v. Tremain*, *ut supra*.

In another case, the Court refused this Writ when it was applied for upon the Affidavit of the Wife against the Husband ; observing, that “ it was once done in the time of Queen Elizabeth, “ by Serjeant Puckering, and refused immediately “ after by Lord Ellesmere, when he *came to the “ seals and has not been done since.” (8)

We have stated, that an application for this Writ must be supported by an Affidavit : but we felt it necessary to qualify that doctrine by the terms, *generally speaking* ; for, in a recent case, the Court thus expressed itself: “ I do not recollect any instance, where a Writ of *Ne exeat Regno* has been “ applied for upon admissions in the Answer ; but “ the admission would certainly do as well as an “ Affidavit.”^w In the case to which we allude, the Court acted, to a certain degree, upon this very principle ; for, upon the admissions in the Answer,

▼ *Sedgwick v. Walkins*, 1 Ves. 49. — *Sedgwick v. Walkins*, 3 Bro. 11. S. C. Mr Brown in a note refers to *Lake v. Decon*, (it should be *Dean*,) *Tothill*, 158, and *Holman v. Audley*, *Tothill* 160, as the two Cases alluded to : but those Cases merely establish the same point,—that the wife shall not be examined against her husband, whilst the two Cases in the text were at variance.—Vide also the case of *Percy v. Powell*, ante, as cited from Mr. Bell's MS.

w *Roddam v. Hetherington*, 5 Ves. 95.

(8) But see the case of *Denton v. Denton*, 1 *John's Ch. Rep.* 441. where the wife's affidavit was held sufficient, on the ground that the application for a *ne exeat* is *ex parte* ; and that, as a married woman is allowed to sue her husband for alimony, “ she ought to be permitted to enjoy the rights of a party,” in regard to the ordinary means of prosecuting with effect.

(*29)

particular application, and have no general connexion with our subject."

Nor shall I trespass upon his patience by investigating, how far the king can by his general or special proclamation, or otherwise, inhibit the subject from going out of the Realm during the time of Peace, or recall him when absent. Innumerable are the *dicta* upon this point, which, as relative to the subject more immediately under discussion, I may be pardoned for passing over in silence.* It is sufficient that the Books admit, that until such Proclamation made, or the writ *Ne exeat Regno*, issued, any person may go beyond sea."

From what we have said it will naturally, we presume, be inferred, that the writ *de securitate in-*

w 12 R. 2, c. 15. — 1 Jac. 1. c. 4. — 3 Jac. 1. c. 5. — 3 Car. 1. c. 2, &c. &c.

x Fitz. Nat. Brev. 188. — 3 Inst. 178. — 1 Bl. Comm. 266. — Dyer 165. b — Knowles v. Luce, Moor 109. — Lord Bacon's Tracts p. 180. — Sands v. Childs, 4 Mod. 176. &c. &c. &c.

y Fitz. Nat. Brev. ubi supra. — Dyer 295. b. The case in Dyer, when compared with the pliant and accommodating principles of that age, is rather remarkable for its doctrine, namely, that departing the Realm without License, solely with an intent to live out and free of the Laws, was no offence, unless there had been express restraint by Writ or Proclamation — "for it is a thing indifferent to depart the Kingdom, and the purpose and cause which is secret in the heart, is not examinable. See the Writ in Nat. Brev. Fitz. in writ *de securitate invenienda*; and to prove the Common Law to be as above, the general prohibition or defending of Richard the "Second against going out of the Realm, except great men."

(*14)

venienda, whether relating to a Layman or a *Clergyman, was a *political writ*. In this, its essential feature, it differed *in substance* from the writ *Ne exeat Regno*, which is purely a *civil Writ*, and resorted to when the object is to prevent a party from withdrawing himself out of the kingdom, to the delay, or eventually to the injury of an honest Creditor. It differed also *in form* from the last mentioned writ, in being founded upon the political pretence that the party withdrew himself for treasonable purposes, whilst the *Ne exeat Regno* contents itself with the allegation, that the Defendant is greatly indebted to the complainant, and designs to go into parts beyond the Sea, which tends to the great prejudice and damage of the complainant.^z With this difference in form, the writ *de securitate invenienda* when relating to a Clergyman, and the writ *Ne exeat Regno* bear, even now, a certain resemblance, and they formerly bore a †perfect resemblance to each other. This may account for the circumstance, that authors frequently speak of them as one and the same identical Writ. When the substantial difference which has always subsisted between them is recollected,

z I speak with reference to the form in which the *Ne exeat Regno* at present issues, since the *Praxis Almæ Curix Cancellariæ* gives us a form of this Writ word for word, the same as the Writ *de Securitate invenienda*. (1 Prax Alm. 135.) That the form in which the *Ne exeat Regno* issued was, and that for a considerable period, and until very lately, such as exhibited in the *Praxis Cancellariæ* will be very evident to the Reader, if he will give himself the trouble of attending to the terms in which the writ is continually spoken of in the older Books, Dyer, Coke, Fitzherbert, &c. &c.

(*15) (†16)

it should seem, that it was never very accurate to treat them as the same Writ. It is still less so in the present day, when, to the difference in substance, there is added a considerable variation in form. (1)

If, however, these two Writs be considered as one and the same, it is not easy to fix the period when the Writ *de securitate invenienda* assumed the name of *Ne exeat Regno*, and was, under that appellation, first applied to Civil purposes. Tothill, indeed, mentions an instance of the application of it "at the suit of Men, in Suit between Party and "Party," in the case of *Welby v. Welby*, which occurred in the 19th of James the First; and he refers to another instance, in the Case of *Hasell v. Badick*, which happened so early as the 32 year of Queen Elizabeth.* But Lord Bacon seems to point to a still more distant date in that Ordinance, where he distinguishes between the proper application of the Writ to *political purposes, and the improper, technically speaking, but yet perhaps far more just application of it, which had arisen for Civil purposes. The Ordinance to which we allude is couched in the following terms:—"Writs of *Ne exeat Regno* are properly to "be granted, according to the suggestion of the

a Tothill's Transactions, fo. 233.

(1) So striking is the difference here referred to, that even the history of the *ne exeat*, when regarded as an instrument of the remedial law, seems to call for very little consideration of that original prerogative of the British crown, of which the author has hitherto treated: and in point of principle, certainly, the two things are wholly distinct.

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^c Vide the Argument in the case of the Company of Merchant Adventurers against Rebow. 3 Mod. 127.

equitable nature, we may merely notice that no Equity could arise here from a "transaction *legally* "satisfied in a country where it arose." Thus where the case appeared to be that the contract was made in Carolina—that a Bond was given, and was afterwards satisfied by a payment in paper money, at the value which it then legally bore in that state. The state of Carolina afterwards passed an Ordinance which made paper of *that kind* not a legal tender in transactions *not complete*. The parties being here, the Plaintiff applied for this Writ, contending that he had an Equity here from the nature of the payment there. Upon the ground we have stated the Writ was refused.*

As this Writ has so strong a tendency to restrain the liberty of the subject, the demand, on which it is applied for, must not be contingent, it being indispensable, that the demand should be certain, or, in other words, clear in its nature.^b When, therefore, a Wife applied for this *Writ against her Husband, in respect of a demand arising by virtue of a Marriage Settlement, whereby the Husband obliged himself to secure a Sum of Money out of his real and personal Estate, as a provision for his Wife in case she survived him, the Court refused to grant the Writ, as the contingency might never happen.ⁱ

g Anon. 1 Bro. 376.

h Anon. 1 Atk. 521.——Rico v. Gualtier, 3 Atk. 501.——
Anon. 1 Bro. 376.——Shearman v. Shearman, 3 Bro. 370.

i Anon. 1 Atk. 521.

Nor should it seem that it would be sufficient, if the demand be equitable, and in the nature of a Debt actually due and certain, if it be not also a Money demand. Thus the Writ was refused upon an undertaking for an indemnity.^k It was likewise refused when applied for against the Agent of a surviving Executor, having in his possession a Bond, which was the security for the residue to which Plaintiff claimed to be entitled.^l The difficulty in the case last alluded to, seems to have been the amount in which the Writ should be endorsed: a difficulty that the Court appears to have considered it would have *been relieved from if the Defendant had possessed himself of Notes, instead of a Bond.

It has been thought that the Case of *Atkinson v. Leonard*^m authorizes the conclusion, that the Writ of *Ne exeat Regno* "shall issue in matters where "the Courts of Law and Equity have *concurrent Jurisdiction*."ⁿ This idea is indeed *partially* corroborated by what fell from the Court in a very recent case, where it observed, that "it was settled"

k *Cock v. Ravie*, 6 Ves. 283, and *Anon. Ca.* there cited by the Court.

l *Storey v. Higgins*, 3 Bro. 475.—It is possible, indeed, to ascribe this decision to another principle; namely, the want of parties to the Suit, a principle which we shall presently be led to consider.

m 3 Bro. 218.

n See Mr. Cox's Note to *Done's Case*, 1 P. Wms. 263.

o I presume the Case here alluded to by the Court was that of *Jones v. Sampson*, cited ante.

“ that though a Plaintiff, swearing to the balance
 “ of an account, may have Bail at Law, yet this
 “ Court, *holding a concurrent Jurisdiction upon the*
 “ *head of account*, he may have this Writ; and
 “ where a Creditor files a Bill for an Account and
 “ Administration of the Assets, if there is a clear
 “ Affidavit of Assets received, this Court will grant
 “ the Writ.”^p Except in matter of account, how-
 ever, I am not aware, that the Court has acted
 upon its concurrent Jurisdiction, in granting the
 Writ of *Ne exeat Regno*. (12)

If this Writ be applied for against a Feme, act-
 ing* as personal Representative, her Husband be-
 ing out of the Jurisdiction, neither coverture, nor
 her inability to give security, appear to be valid
 objections to its issuing: for where an application
 was made for this Writ against a Wife, Executrix
 of a former Husband, the Writ was granted against
 her alone, her then Husband having left the King-
 dom.^q

In the Case^r reported by Dickins, this Writ is-

p *Jones v. Alphenin*, 16 Ves. 470.

q *Jerningham v. Glass*, 3 Atk. 409.—*Jernegan v. Glass*,
 1 Dick. 107. S. C.—*Ternegan v. Glass*, Amb. 62. S. C.—
 See *Boyce v. Hole*, and *Moore v. Mellish*, (Q. If not *Mey-*
nell?) there cited.—The Reader will find a Note of *Moore*
v. Meynell, in 2 Vern. 614, copied by Mr. Raithby from R. L.
 —See also *Moore v. Meynell*, 1 Dick. 30. S. C.

r *Moore v. Meynell*—ubi supra.

(12) And the reason probably is, that other subjects of concurrent juria-
 diction are seldom of a nature to furnish a proper occasion for the writ.

sued against a Feme Covert, the Administratrix of her former Husband, who had come to England upon business, and meant to return. She gave Bail, put in her answer, and then applied to have the Writ discharged, which the Court ordered upon her giving security. The Reporter adds this N. B. "The Court upon this application put terms upon the Plaintiff to speed the cause."

But, it would seem, that when the Writ issues *upon declarations, or facts, as evidence of an intention to go abroad, it will not be discharged upon the Defendant's mere Affidavit, denying his intention to do so.*

Nor, with regard to the Debt, will either the Defendant's oath, or the Plaintiff's admission, that no debt is due, counteract or prevail against a positive Affidavit, on the part of the Plaintiff, of an existing Debt.†

It is said, indeed, that the Court will not discharge this Writ upon coming in of the answer, even where it has issued until answer and further order, if it appear upon the merits, that there will be necessarily things decreed for the Defendant to do at the Hearing, such as to deliver Deeds, &c. &c. to discover, to convey, &c.‡ It certainly does appear to be purely discretionary in the Court,

s *Amsinck v. Barclay*, 8 Ves. 594.

t *Jones v. Alphenin*, 16 Ves. 471.

u *Atkinson v. Bedel*, 1 Dick. 98.

particularly to the point of declarations, observed, "it is not sufficient to show that another person said so." Before I quit this part of our subject I shall put the Reader in possession of Lord C. Eldon's Judgment in the case of *Percy v. Powel*, for a very valuable note of which I am indebted to the obliging liberality of Mr. Bell. "I think," says his Lordship, "this affidavit is not sufficient: Mr. Percy does not swear to any threat to go abroad; he only swears to his information and belief, and upon that information, according to the fair construction of the affidavit, he founds his belief, that the Defendant is going abroad. The whole, therefore, depends on his information, which may be true or false: he gives no reason why the party giving him the information who is not named, does not join in the affidavit, which that party ought *to do." It is consistent with this affidavit that he may have his information from Grace Powell, the wife of the Defendant; if that is the case, as it has been determined,^o that a wife's affidavit cannot be read to support this sort of application against the Husband, it is impossible, that another person's affidavit can be sufficient, founding belief on her information without her affidavit."^p (6)

n See *Hannay v. M'Entire*, ubi supra.

o Vide *Infra*, the Case of *Sedgwick v. Walkins*, &c.

p From Mr. Bell's MS.

(6) "There ought to be a positive affidavit of a threat or purpose to go abroad." *Mattocks v. Tremain*, ut supra.

The Practical Register informs us^q that, “this Writ is now mostly used where a suit is commenced in the Court against a Man, and he designs to defeat the other of his just demand, or to avoid the Justice and Equity of this Court, is about to go beyond Sea, or, however, that the Duty will be endangered if he goes.” This naturally brings us to the consideration, how far it is necessary for the affidavit to allege, that the Defendant intends going abroad to avoid the Jurisdiction, or that the Debt will be endangered by his quitting the Kingdom; questions which have been more than once under discussion. In one instance Mr. *Scott moved the Court to discharge an order for a *Ne exeat Regno*; on the ground that the Affidavit, on which it had issued, did not go so far as to swear the Plaintiff would be in danger of losing his Claim by the Defendant’s leaving the Kingdom;’ but Lord C. Thurlow said, “that it might have been stronger if the Plaintiff had sworn he would be in danger of losing his claim; yet, as the Bill was brought for the demand, the Defendant’s quitting the Kingdom, whereby the Court lost its Jurisdiction, was a strong implication, that it was with a view to avoid it,” and therefore denied the Motion.^s In two subsequent

q Page 289.

r The Reporter must have mistaken the authorities cited, which do not appear to be in point.

s Baker v. Haily, 2 Dick. 633.

“debt is owing to one person,^x much less before
 “there appears any duty or Judgment given to
 “ascertain the Debt; and this would be not only
 “to alter the Laws of the Kingdom in that respect,
 “but likewise by compelling the Defendant, who
 “is an Executor, to give security, when at Com-
 “mon Law he is not to be held to Bail. The
 “Court allowed the Demurrer.”^y

On the ground that this Writ is in the nature of equitable Bail, the Court has, in many instances, shown a desire to preserve a certain analogy between the Writ of *Ne exeat Regno*, and Bail at Law.^z Thus in the case of *Amsinck v. Barclay* the Court discharged the Writ, the Defendant having previously been held to Bail at Law; since at Law a Defendant cannot be held to Bail twice for the same cause. (14)

*We must not, however, infer, that this analogy is universal; for we find the Court in one case laying it down, that “the application for the Writ of
 “*Ne exeat Regno* stands upon a ground perfectly
 “different from an Affidavit in a Court of Law to
 “hold to Bail. That is a process which the party
 “has a right to take upon his own Affidavit, with-

^x This Case was decided in 1676.

^y *Bridge v. Hindall*, Finch, Rep. 257.

^z *Russel v. Asby*, 5 Ves. 97.—*Amsinck v. Barclay*, 8 Ves. 594, &c. &c.

(14) But, in peculiar circumstances, the writ has been allowed after an arrest at law. *Porter v. Spencer*, 2 Johns. Ch. R. 169.

“out any application to the Court. But whatever
 “is the case of proceedings at Law, an application
 “for the Writ of *Ne exeat Regno*, is to the discre-
 “tionary power of this Court, acting beyond the
 “limits of the Common Law, and applying a re-
 “medy certainly in its origin not distinctly appli-
 “cable to private transactions between subject
 “and subject.”^a

As this Writ is founded upon the supposed Pre-rogative of the King to restrain his *own subjects* from departing the Realm, it would seem, that, strictly speaking, it could not, upon principle, issue to prevent Foreigners from quitting the Kingdom. *It is said*, indeed, that Lord Northington’s opinion was against such an extension of it.^b But we find the Court of Exchequer* in one Case obliging a foreigner to give Security, until answer and further order; but refusing to make an order, in the nature of a *Ne exeat Regno*, when the Answer had come in.^c In a still more recent instance, the Court of Chancery granted this Writ against one foreigner at the suit of another; and, though the Writ was ultimately discharged, it was not so upon the ground of its having issued against a foreigner, which the Court appears tacitly to admit it might, in observing, that “it was very delicate to interfere against foreigners, whose occasions or misfortunes have brought them here, by an application of this

a De Carriere v. De Calonne, 4 Ves. 590.

b Vide Atkinson v. Leonard, 3 Bro. 218.

c Whitehead v. Murat, Bunb. 183.

“ Writ to them; and that it would be a necessary
 “ term, that it should be simply a Case of Equity
 “ affording no ground to sue at Law.”^d

But, whether the Writ shall issue against a foreigner, or, indeed, a person usually resident out of the Jurisdiction, in respect of a demand which originated abroad and may there be tried, seems to have been a question which Lord Hardwicke was called upon to consider in two instances. In the first of these, the demand was *for Negroes in Antigua, and his Lordship discharged an order for a *Ne exeat Regno*. “ The person of the Defendant,” concludes Lord Hardwicke, “ is amesnable, for he
 “ is a native of Antigua: he is going to Antigua;
 “ his effects, and likewise the Negroes, are there,
 “ and have been used in that place. It is a colony
 “ subject to England, and the Plaintiff may have
 “ justice done him in the Courts there.”^e In the other case his Lordship said, that “ it was a reason that generally prevailed with him not to
 “ grant this Writ, where one of the parties corresponding or dealing lived out of the Kingdom,
 “ and the transactions were on the faith of having
 “ justice in the place where the parties respectively resided. And so it has been held,” continues his Lordship, “ where one lived in England,
 “ and the other one in one of the Plantations or
 “ Settlements belonging to England, which are governed by the same Laws, except some few pe-

^d Vide *De Carriere v. De Calonne*, 4 Ves. 591.

^e *Pearne v. Lisle*, Ambl. 76.

“culiar to the place. But in Gibraltar and Mi-
 “norca the Laws are not the same as here. In
 “the former, the Jurisdiction is not adapted to the
 “determining property and accounts between
 “Merchants. In Minorca, the Spanish method of
 “justice prevails, and, therefore,* the reason does
 “not hold, where one of the parties resides in one
 “of those places. But I do not rely on that so
 “much, as that there was no faith between the
 “parties here; and having justice where they re-
 “side; for two of them lived at first at Gibraltar,
 “afterwards one of them removed to Minorca.”^r
 The Writ was discharged upon the Defendant’s
 giving Security to abide and perform the Decree.
 But when, on a subsequent occasion, Lord Thur-
 low was led to speak of the decision of *Robertson*
v. Wilkie, he observed, that “Lord Hardwicke is
 “there made to take a difference between the
 “English Law, as administered at Gibraltar, and
 “the Spanish Law, at Minorca. In both cases,
 “justice would be equally certain. Lord North-
 “ington thought the Process ought not to be ex-
 “tended to foreigners: that could only apply,
 “where the justice of the case would be equally
 “certain to be done.”^s If we pause for a moment
 to reflect upon these different opinions, we find,
 that Lord Northington was, as it is asserted, averse

^r *Robertson v. Wilkie*, Ambl. 177.—Mr. Ambler does not
 state what were the circumstances of the Case: but the Reader
 will find them in 2 Dick. 786, S. C. upon an application for the
 Writ in the first instance.

^s *Atkinson v. Leonard*, 3 Bro. 218.

to extend the Writ to foreigners,* leaving the question as to those subjects who resided out of the Jurisdiction untouched:—that Lord Hardwicke was not inclined to grant the Writ against a person, who was going to a place where he would be amenable, or where one of the parties resided out of the Kingdom, and the transactions were on the faith of having justice where they lived; and that Lord Thurlow, whilst he appears rather to dissent from Lord Hardwicke's reasoning in that individual instance, chose ultimately to take a middle course, by ordering the party to give Security.^b (15)

Before we dismiss this part of our subject, we must notice another Case before Lord Hardwicke, upon which we shall leave the reader to make his own comments. The Plaintiffs were Assignees of a Bankrupt, who had Effects in Scotland: the Defendant was a Merchant in London, and a Creditor of the Bankrupt. He arrested the Bankrupt's Effects in Scotland, in the hands of the Bankrupt's Debtors; and obtained a Decree, or Sentence, according to the Laws of that Country, for payment of the Money, and received part, and being about to go abroad, the Plaintiffs obtained an order for a *Ne exeat Regno* till answer and further order. Upon

h See further, *Roddam v. Hetherington*, 5 Ves. 91.

(15) In a late case, however, the writ was allowed against a man, generally resident abroad, who had only come to England for a temporary purpose, and was liable to a legal arrest for the same demand. This is the case of *Howden v. Rogers*, before cited. And the same rule has been adopted in New-York. *Woodward v. Schatzell*, 3 Johns. Ch. R. 412.

• (*48) (†49)

the Defendant's applying to discharge the Writ, Lord Hardwicke observed—"Commissions of Bankruptcy equalise all Creditors in England; and, as the Defendant is resident in this Country, he is subject to the Laws thereof; and therefore I will not permit any person to pass into Holland or Scotland, where arrestments are allowed, to gain a total satisfaction of their Debt, in prejudice of the other Creditors. For, if he goes out of England, and out of the reach of the process of this Court, his Agents may recover the Debt, and he can never be accountable here; therefore let the Writ be continued."ⁱ

The Writ of *Ne exeat Regno* will issue to prevent a person from going to Scotland.^k

But, where it is intended to restrain the party from going into Scotland, *it is said*, "the Condition must be, not to go out of the Realm, or **to Scotland*; for if it be only, not to go out of the Realm, the Party's going to *Scotland* will not forfeit the Bond or Recognisance."^l This doctrine is contained in a Note of the Reporter, but he refers to no case in support of it. Probably it was a *dictum* of Lord Harcourt's: or, perhaps one of the points

ⁱ Mackintosh v. Ogilvie, 1 Dick. 119.

^k Done's Case, 1 P. Wms. 262.—Bernal v. Marq. of Donegal, 11 Ves. 43.—Anon. Ca. Salk. 702.—Wilson v. Boswell, 1 Dick. 535.—See also Mackintosh v. Ogilvie, 1 Dick. 119. cited *supra*.

^l See Note to 1 P. Wms. 263. Done's Case.

decided in *Done's* case. But, in a subsequent case the point came immediately under the consideration of Lord Talbot, on a motion, that a *Ne exeat Regno* should be so framed, as to prevent the Defendant from going to Scotland. His Lordship asked "what authority he had to alter an original writ ; especially as this writ was not originally intended to aid the process of this Court, but was a mandatory writ to prevent the King's subjects from going into foreign countries to practise treason with the King's enemies ? And he seemed to think, that this case must have happened since the Union ; and yet he had never known, nor heard, that any attempt had been made to alter the writ : and he said, that perhaps there was no foundation for the doubt, whether the common Writ would not prevent the Defendant from going into Scotland, as well as any of the King's *other dominions, out of the reach of the process of the Court. Mr. Hamilton informed the Court, that something of this kind had been moved in one Mitchell's case in the Lord Cowper's time, who seemed to think, that the writ extended to *Scotland* notwithstanding the Union, and did nothing in it. The Registers likewise said, they never knew any other than the common order made." On the ground of the danger of altering old established forms, Lord Talbot ultimately declined making any order, but left the parties to proceed in the old beaten path."

m Hunter v. Maccray, Ca. Temp. Talbot, 196.—Mr. Wooddeson appears to consider the doctrine as established by (*51)

The Note in *Peere Williams* is further shaken by what fell from the Court in a recent case, where it is represented as saying, "Upon this Writ, the Law has settled the form; and this Court has no authority to alter the form. In the *Scotch* cases the construction was, that the party was going towards foreign parts, in the language of the Writ, if he went *out of the jurisdiction; and, the Writ having existed, when *Scotland* was to all intents and purposes foreign parts, the Union did not mean to alter for this purpose, what had before been considered as foreign parts."ⁿ

Upon the whole, the doctrine of the note in *Peere Williams* is in opposition to the concurrent opinions of Lords Cowper, Talbot, and Eldon,—and is likewise incompatible with the Registers' statement. The reader can now fully appreciate its importance.

On an application for a Writ of *Ne exeat Regno*, to restrain a Member of Parliament from going to *Ireland*, the Court refused it, on the ground, that—"this State Writ had never been applied to such

the note in *Done's Case*; and observes, that that Case, though prior in point of time, was not printed when the doubt in *Hunter v. Maccray* arose; and, as it was above twenty years earlier might easily escape observation. (1 Vin. Lect. p. 183.) On the other hand, the Case of *Bernal v. Marq. of Donegal*, which we shall immediately have occasion to cite, was very recently decided.

ⁿ *Bernal v. Marq. of Donegal*, 11 Ves. 46.

(*52)

“a case, though the occasion for the application
“must frequently have existed.”

But it does not seem, that it would be any objection to the granting this Writ, if the subject matter in dispute be out of the Jurisdiction of the Court; for this Writ has issued to prevent a man's quitting the Realm when the subject *matter in dispute was Land that lay in *Ireland*.^p

Since real property is so important an Article of Commerce in the present day, it would seem material to ascertain, what advantage a Vendor could make of this Writ against a Purchaser on the point of quitting the kingdom, without having specifically performed his Contract. If upon this subject the cases are few, they are by no means easily reconciled. In *Goodwin v. Clarke*, a Bill was filed to have a specific performance of an Agreement, and that the Defendant might pay 1900*l.* the remainder of the purchase-money, 100*l.* having been paid, and the Defendant threatening to go abroad. The Writ it seems was granted; but, for what reason it does not appear, it was ordered to be marked in the sum of 300*l.*, upon which the Reporter very naturally makes a Query. In a note subjoined by the Reporter he informs us, “the above case was cited by Mr. Sel-

^o *Bernal v. Marq. of Donegal*—ubi supra.

^p *Archer v. Preston*, 1 Eq. Ca. Abr. 133. from *Arglasse v. Muschamp*, 1 Vern. 77 —See also *Mackintosh v. Ogilvie*, 1 Dick. 119. —*Jackson v. Petrie*, 10 Ves. 164.

^q 2 Dick. 497.

*wyn, the 21st of June 1784, Anon. on an application to Lord Thurlow, C. for a *Ne exeat Regno* on the like *grounds, his Lordship put this question, how doth it appear that the Plaintiff can make a title; and, although he go abroad, *non constat* he hath no property here; and in what sum am I to order the Writ to be endorsed? Therefore take nothing by the motion." Mr. Sugden would reconcile these two cases thus—"A Writ of *Ne exeat Regno* does not lie against a Purchaser who has not paid the purchase-money, upon his threatening to go abroad, unless the Vendor's title has been accepted, and the purchaser has no property here." Whether the Title was accepted in the first of these cases, or whether the defendant had any property here, do not appear. We must necessarily infer both these circumstances, before we can reconcile the cases. If we do not, we cannot reconcile them; and, I confess, they do not appear to me to be capable of being reconciled. Confining ourselves merely to the measure of inconvenience, it would certainly be very great, if a Purchaser should quit the Kingdom, leaving an executory Contract hanging over the head of a Vendor, which naturally precluded his otherwise disposing of the property. On the other hand, it may be asked, how will the Purchaser's having property here mend the matter? If it does, would not another difficulty arise as to the *quantum* of it—for if looked

r Treat. on Law of Vendors and Purch. p. 184.—Mr. Sugden also refers to *Jackson v. Petrie*, 10 Ves. 164.

(*54) (†55)

at as being tangible by the Vendor, and to assume that, is really to assume a great deal, where would be the security, if, for example, it only amounted to 50% and the purchase was 5000%.?--a case in this speculating age by no means improbable—certainly not impossible.

Upon the whole, the doctrine on this point appears at present by no means to be settled. Nor can we come to any conclusion that can be relied upon until the question shall be formally brought before the Court, and set at rest by a solemn adjudication. (16) The same observation might be applied to other parts of the doctrine of the *Ne exeat Regno*—an inconvenience, perhaps, in some measure inseparable from this branch of equitable Jurisdiction. The Jurisdiction itself is of a highly delicate nature. Every application for the Writ is an appeal, and a bold appeal, to the soundest discretion of the Court. But if, from a conviction of these circumstances, the Court feels the necessity of pausing ere it determine, the urgency of the circumstances imperiously forbids all delay. Called upon to act, or perceiving that the power of acting with *effect may be lost, it is not surprising that different Judges have decided cases upon the *Ne exeat Regno* which are not easily to be reconciled: a consequence to be ascribed principally to the circumstances to which we have alluded,

(16) There is a late case in which this question was agitated—but the decision turned chiefly on another point. *Raynes v. Wyse*, 2 *Main. R.* 472.

and partly to this being a branch of the Jurisdiction but seldom resorted to.

If it appear, that the Bill, upon which this Writ is prayed, must, at the Hearing, be dismissed for want of parties, the Motion for a *Ne exeat Regno* will not succeed.* (17) Thus the Writ was refused at the instance of a plaintiff, who was the Assignee of a Bond, the original Obligee being dead, and nobody having administered to him.†

At the period when this Writ issued on an Affidavit merely, *it was said* that “a Defendant “could not obtain this Writ on an Affidavit, as a “Plaintiff might.”‡ Whether, indeed, a Defendant could by any means, and, if so, by what means, have then obtained it, do not, as I am aware, appear.

*But, in a more recent case, where one Defendant moved for this Writ to prevent another Defendant from going into Scotland, it was granted, on the ground, that the subject matter of the Suit was “matter of account, in which both parties are Actors, and Money being sworn due “from the party, against whom the writ was pray-

s Ray v. Fenwick, 3 Bro. 25. — See also Storey v. Higgins, 3 Bro. 475.

t Ray v. Fenwick — ubi supra.

u Pract. Reg. 289. (Wyatt's Edit.)

(17) So also, if the bill want equity. *Woodward v. Schatzell*, cited above.

"ed." In another case, the Defendant obtained this Writ against his own *Solicitor* in the cause, having overpaid him the sum of 60*l*.^x (18)

But when a Plaintiff had two demands upon a Defendant, the one liquidated, the other matter of account, the Court ordered the Writ to be marked for the former demand only.^z

^{*} *It is said*, that this Writ may be granted in any case, "where there is danger of subterfuge from the Justice of the Nation, though of private concernment."^y But this *dictum* seems materially to be shaken by what fell from Lord *Rosslyn in the case of *Gardiner v. Edwards*,^{*} where he is described as observing, "It is too general a ground to take for supporting this Writ, or any other proceeding in this Court, that I will act generally to prevent injustice." (19)

It has been decided, that a Surety on a Writ

v Done's Case, 1 P. Wms. 262.—We shall have occasion to recur to this case in Chap. III. of this Essay.

w Loyd v. Cardy, Prec. Ch. 171.—We shall recall the Reader's attention to this case in Chap. III. of this Essay.

x Parker v. Appleton, 3 Bro. 426.

y Anon. 2 Ch. Ca. 245.

z 5 Ves. 592.

(18) It seems a Defendant may have the writ, on the footing of the bill filed against him. *Matlocks v. Tremain*, before cited.

(19) The prevention of injustice is always the *end* for which a *ne exeat* issues, but does not always afford the *rule* for granting it.

(*58)

of *Ne exeat Regno* shall not be discharged, upon the Principal's putting in his answer, nor even upon his Principal being, by a subsequent Process of the Court, committed to Prison, the Court observing that the Surety was then in no danger.^a But this decision seems to be at variance, if it be not entirely irreconcilable with a subsequent case; where, after a Decree against a Defendant for the same matter as the Writ of *Ne exeat Regno* issued, the Defendant being in Contempt, and in Custody for not performing the Decree, the Sureties applied and obtained an *order that they should be discharged, and the Bond as to them cancelled.^b

As, however, the real object of this Writ is to compel the Defendant to abide the event of the Suit, the Court inclines to discharge the Writ, upon security for that purpose being given.^c By analogy to the same principle, and because it was a better security, the Court has discharged this

a *Le Clea v. Trot*, Prec. Ch. 230.—In a MS. in my possession, written by Sir George Carey, the Master in Chancery, and Author of the small volume of Reports which passes under his name, I find the following passage—"A Bail in this Court, or in the Civil Law, is not discharged upon bringing in the Principal as he is at Common Law. Archepoole contra *Burrell, Michas.* 23 et 24 Eliz."

b *Debazin v. Debazin*, 1 Dick. 95.

c *Baker v. Dumaresque*, 2 Atk. 66.—*Jerningham v. Glass*, ubi supra.—*Robertson v. Wilkie*, ubi supra.—*Atkinson v. Leonard*, ubi supra.—*Moore v. Meynell*, 1 Dick. 30.—*Boon v. Collingwood*, 1 Dick. 115.—See also *Crisp v. Bishop*, cited in *Read v. Read*, 1 Ch. Ca. 115.

(*59)

Writ upon the payment into Court of the sum for which the security was taken.^d (20)

If a Defendant, indeed, consider himself aggrieved by the issuing of this Writ, he may apply to the Court to have it discharged, when his objections will be discussed. But, it should seem, that this is not his only means of redress, for Lord Holt does not hesitate to say, that “the Writ of *Ne exeat Regnum* ought not to be granted, but upon “great reason and examination ;* otherwise a “*homine replegiando* may lie.”^e

But since a *homine replegiando* is nearly, if not entirely, obsolete in practice, it might be asked, Whether a *Habeas Corpus* would issue, if the Writ of *Ne exeat Regno* were improperly granted ? This point has not, as I am aware, in precise terms, been decided ; but in Nailor’s case the Court of King’s Bench held, that a person being in custody for want of Bail, and having had a *Ne exeat Regno* issued against him, may be brought to B. R. by *Habeas Corpus* to be charged with an Action.^f

^d Evans v. Evans, 1 Ves. 96.

^e Anon. 7 Mod. 9.

^f Nailor’s Case, 12 Mod. 562. — 1 Raym. 696. S. C. — Holt, 494. S. C.

(20) And this has been done even where it appeared that a much larger sum was due to the party. *Baker v. Jeffries*, 2 Cox’s Eq. Ca. 226. And on the other hand, where less was found to be due, the actual balance and no more, was required to be brought in. *Dick v. Swinton*, 1 Ves. and B. 371.

It is also laid down in the same Case that a *Nex exeat Regno* is not an action as a *homine replegiando* is.^g

It is said, in the case of *Calthrop v. Axtel*,^h that this writ in one instance issued against a person who had without the Parent's consent, *married an Heiress under the age of sixteen, and whose estate, therefore, became forfeited during her life under the Statute.ⁱ It is very difficult, if not impossible, to reconcile such an instance of the Writ to the principles upon which the Court of Chancery acts.

We may, I apprehend, without much temerity conclude, that the Court would in the present day hesitate for a considerable time before it would follow the precedent of the case alluded to in *Calthrop v. Axtel*.

g Per Holt, C. J. in *Nailor's Case*.

h 3 Mod. 169.

i 4 & 5 P. & M. c. 8.

(*61)

CHAPTER III.

It remains to conclude this Essay, by adding a few practical remarks and references.

From what we have said,^a it will appear prudent at least, if not absolutely necessary, that the Plaintiff should file his Bill previously to making an application for the Writ of *Ne exeat Regno*.

The usual way^b is to pray for the Writ *Ne exeat Regno* in the Bill. How far it is absolutely necessary so to do, is a point not quite so *clear, if at least, we may attach credit to a case mentioned in a Book but little known. "28th June, 1747. Upon the Motion to discharge the Writ *Ne exeat Regno*, the Attorney-General objected, that the Bill did not pray it, and there was no charge in

a Ante, p. 21, 22.

b See Redesd. Tr, Ch. Pl. 46.—Cooper's Tr. Ch. Pl. 13.—Hind. p. 18.—Fowler's Pract. Exch. 1, 34. The form of the Conclusion of a Bill praying a Writ of *Ne exeat Regno*, the Reader will find in Hinde's Practice, p. 18.—and of the Conclusion of a Bill praying a special order in the nature of this Writ to be granted by the Court of *Exchequer*, in Fowler's Excheq. 1. 36.

"the Bill introductory to it. The Chancellor was of opinion, there was no necessity to pray it, and that a party might apply for a *Ne exeat Regno*, pending a Suit, though not thought of at the beginning."^c It would certainly be very hard upon a party, if he could not apply for this Writ pending the Suit when it was unnecessary, and consequently not thought of, at the commencement of it. The question, therefore, is not, whether a party can apply for it pending the Suit, but whether, if he did so, he ought not by amendment or supplemental Bill to pray for it? But, on the other hand, if it be necessary specially to pray for it, how can we reconcile the doctrine of *Done's Case*,^d where it was granted against one *Defendant* at the Suit of *another*?

*The term "prayed," which occurs, as the Chancellor remarks, in *Done's Case*, can hardly be with propriety applied to any thing but the Motion. We scarcely can infer from it, that any Bill was filed specifically praying the Writ.

c Epitome of the Pract. in Ch. by Turner, p. 52. This Case is most probably extracted from some book of authority; but I have not been able to trace it.

d 1 P. Wms. 262, cited ante. In *Loyd v. Cardy*, Prec. Ch. 171, cited ante, a *Defendant* obtained this Writ against his own *Solicitor* in the Cause *without having filed a Bill*. But *ex parte Bruncker* has on that point, it seems, over-ruled *Loyd v. Cardy*. On that point, has it not the same effect on *Done's Case*? But allowing that it cannot issue without a Bill previously filed, it by no means necessarily follows that it *must* be prayed. By analogy to the doctrine of Injunction it ought, perhaps, to be prayed. (*Savory v. Dyer*, Ambl. 70.)

(*64)

We have stated,^e that the application for the Writ must, generally speaking, be accompanied by an Affidavit, swearing positively to the amount of the Debt, unless in the case of Account, when *belief* will suffice.^f

We have also observed, that when the demand is against an Administrator, the Plaintiff should swear, either positively, or to the best of his knowledge* or belief, that Assets have come to the hands of the Defendant.^g

The Affidavit should also show, that the Defendant intends going abroad, and should allege, that the Debt will be thereby endangered.^h

The various grounds, upon which an application for this Writ can be *successfully* resisted, the reader will collect from the preceding pages, where those grounds are incidentally stated.

We may here notice an observation made by Lord C. Eldon—"that though the Court will act promptly upon this application, almost amount-

^e Ante, p. 22, 23. It should seem from the Books of Practice that the application may be made either by Motion or Petition. Hind 611.—Pract. Reg. 289.—The form of Petitions for such purpose the Reader will find in Turner's Practice, 832—834.

^f Ante, p. 23.

^g Ante, p. 24.

^h Ante, p. 24, et seq. The Index to Mr. Turner's Practice in Chancery, refers for forms of Affidavits to p. 591—592, of that work.

ing to surprise, care must be taken, that the application is made as promptly as possible.”^u

The inference is most obvious. Supposing, however, that the application for the Writ is successful, it is endorsed in a certain sum.*

*Though the Books lay it down, that—“the party who sues it commonly marks on the back of the Writ in what Sum, the Bond for yielding obedience to the Writ shall be;”^k yet a very slight attention to the Cases will show, that however the Court may choose, in any individual instance to regulate itself by the Affidavit of the party applying for the Writ, yet that the Sum in which it shall be marked is purely at the discretion of the Court.

When the Writ issues, it issues I apprehend, until answer and further order.

Some of the Books intimate, that it may be discharged upon the Defendant’s satisfying the Court by Answer, *Affidavit*, or otherwise.^l The weight, however, of the Defendant’s *own Affidavit* we have already had occasion to touch upon.^m

i Jackson v. Petrie, 10 Ves, 166.

k Pract. Reg. 290.—Hind. 611.—Mosely, 191.

l Pract. Reg. 290. Vin. Abr. 539, v. 15.

m Ante, p. 40. See also side-note to Russell v. Asby, inserted in the next note.ⁿ

As to the mode of executing this Writ, it is said to be "an abuse of this Process to break *open "Doors, and take the party in bed; but yet the "Court would not order him for this cause to be "set at liberty."^a

The Defendant, when taken upon the Writ, must, according to the Books, enter into three different Bonds—one to the Sheriff, another to the Master of the Rolls, and a third to a Master in Chancery.^o

Upon the coming in of the Defendant's Answer, he may unquestionably, and that on any of the various grounds we have incidentally stated, apply to discharge the Writ.

To this application the Court will unconditionally accede, and then there will be an end of the Process; or the Court will continue the Writ; or it will pursue a middle course, by discharging† the Writ, upon the Defendant's giving security to abide and perform the Decree of the Court. From some of the recent Cases it should seem,

ⁿ Pract. Reg. 290. In a side-note to *Russel v. Asby*, 5 Ves. 96, Mr. Vesey informs us—"Upon an application for the Writ "of *Ne exeat Regno*, no *Subpœna* is served; but upon personal "service of the Writ the party is bound to appear, and to put "in his Answer; and then he may apply to supersede the "Writ, but not before." The *Subpœna* is, however, *prayed*. Fowler's Excheq. 1—36.

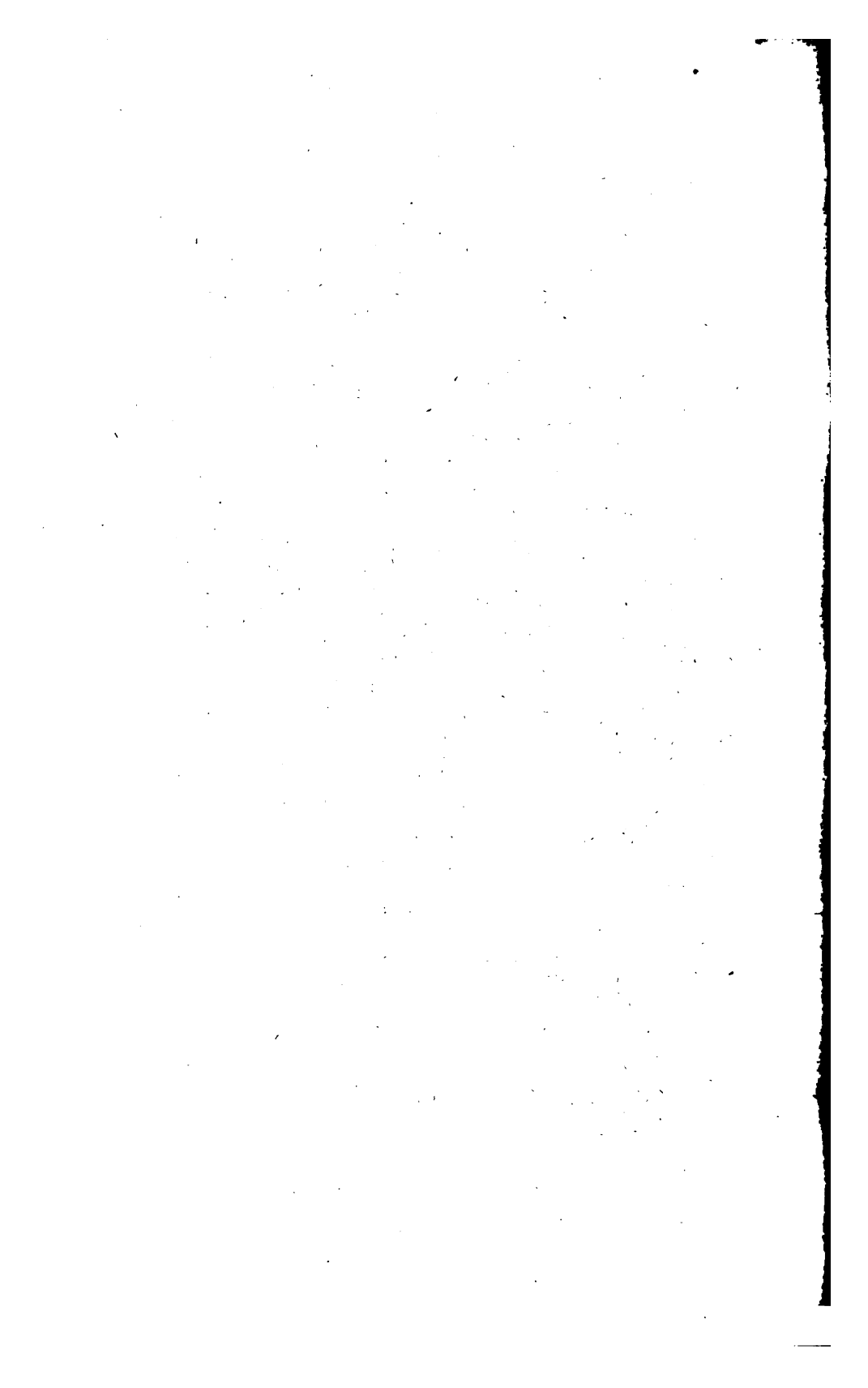
^o Pract. Reg. 290. Hind. 612, Note Z.—Bacon's Abr. Harrison's Practice, &c. &c.

(*67) (†68)

that the inclination of the Court strongly tends to make this middle course the general practice.

In concluding this imperfect attempt, it is almost unnecessary to add, that the decisions to which we have appealed are, in general, and with the exception of two or three solitary instances, the decisions of the Court of Chancery.—It is perhaps, equally unnecessary to observe, that though the *Writ of Ne exeat Regno* is, strictly speaking, confined to the Court of Chancery, yet that the Court of Exchequer grants Orders in the nature of that Writ, applying them only to Cases to which the Court of Chancery applies the *Ne exeat Regno*.^p

p Vide *Bernal v. Marq. of Donegal*, 11 Ves. 46.—Fowler's Pract. Excheq. l. 203, et seq.



APPENDIX.

No. I.

“ REX Vic', &c. Quia datem est nobis intelligi,
“ quod *A. B.* Clericus, versus partes externas, ad
“ quamplura nobis et quampluribus de populo
“ nostro præjudicialia et dampnosa *ibid'*. prose-
“ quend', transire proponit: Nos, malitiæ suæ
“ resistere volentes in hac parte, tibi præcipimus,
“ firmit. injungentes, quod præd. *A. B.* coram te
“ corporalit. venire fac', et ipsum ad sufficientes
“ Manuceptores inveniend', qui eum manucapere
“ voluerint, sub certa pœna eis per te rationabilit.
“ imponend', pro qua nobis respond. volueris;
“ OR THUS, et ipsum *A. B.* ad sufficient. securita-
“ tem inveniend'. sub pœna centum librar. ad opus
“ nost. solvend. vel quilibet eor. sub pœna, &c. quod
“ ipse versus aliquas partes externas sine licentia
“ nostra speciali se non divertat, nec quodcunque
“ *ibid.* prosequatur aut prosequi vel attemptari
“ facere præsumet, quod in nostro contempt' vel
“ præjudic' aut populi nostri dampn. cedere va-
“ leat, nec aliquem aut aliquos *ibid'* mittet ex hac
“ causa, quovis modo compellas. Et si hoc coram
“ te fac. recusaverit, tunc ipsum *A. B.* prox. Gaol.
“ nostræ committas, in ead' salvò custodiend',

“quousque hoc gratis fac. voluerit. Et cum se-
“curitat. ill. sic ceperis, nos inde in Cancellar.
“nostr. sub sigillo tuo distinctè et apertè sine di-
“latione redd. certiores, vel certifies indilatè,
“hoc Breve nobis remittens. Teste,” &c.

No. II.

“**REX I. de B. salutem. Quia datum est no-**
 “bis intelligi, quòd tu versus partes externas ab-
 “sque Licentia nostra clàm destinās te diverter’,
 “et quāmplura nobis et Coronæ nostræ præju-
 “dicialia ibidem prosequi intendis, in nostri con-
 “temptum et præjudiciū, ac contra proclama-
 “tiones et inhibitiones nostras indè sæpius factas :
 “Nos, hujusmodi contemptui et præjudicio obviare
 “volentes, tibi districtè sub periculo quod incum-
 “bit prohibemus, ne versus partes externas absque
 “licentia nostra speciali aliquāliter te divertas,
 “nec quicquam ibidem prosequi attemptes, seu
 “attemptari fac’, quod in nostrum seu dictæ Cor-
 “onæ nostræ præjudic’ cedere valeat quovis modo,
 “nec aliquem ibidem mittas et hac causa. Teste,”
 &c.

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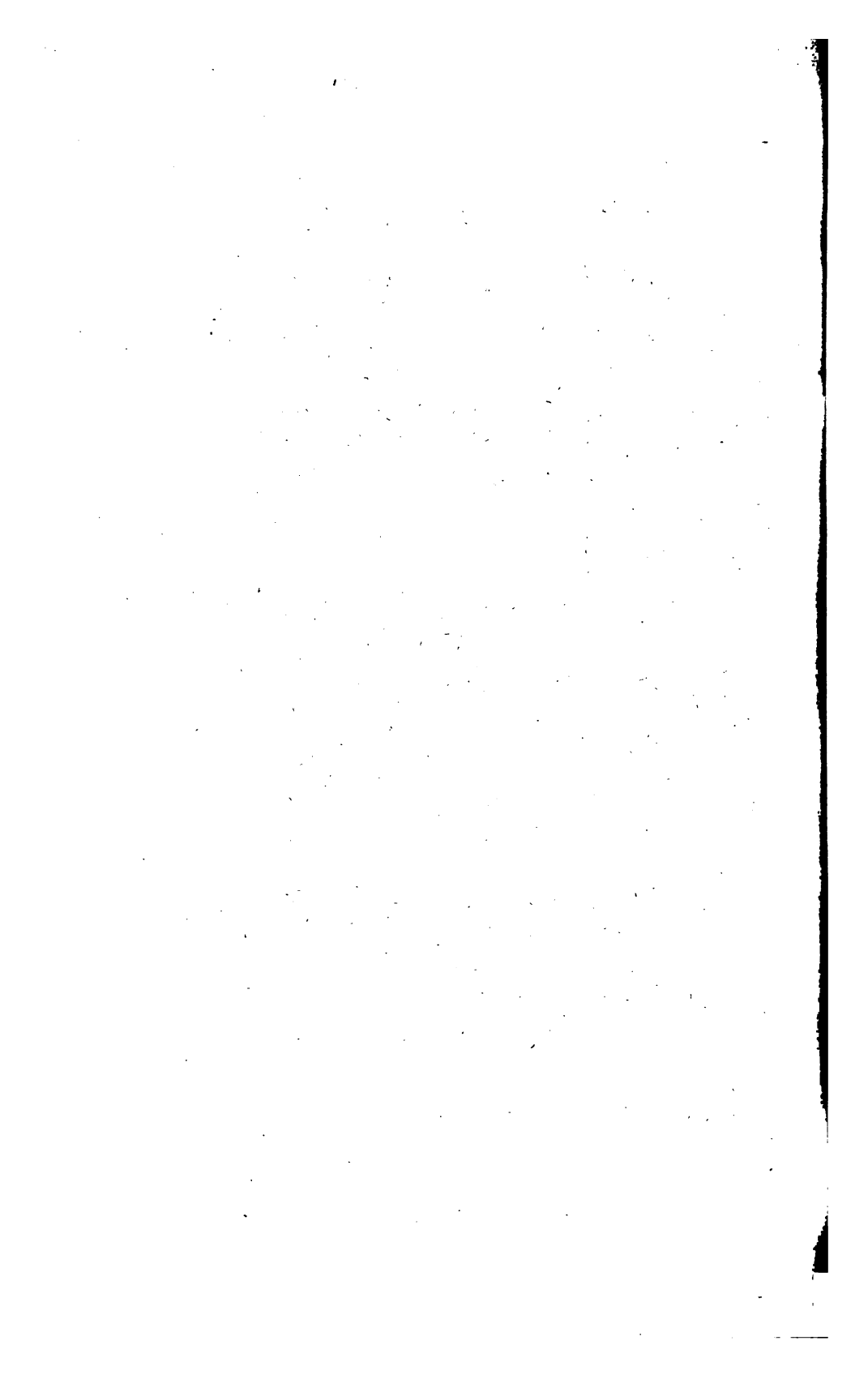
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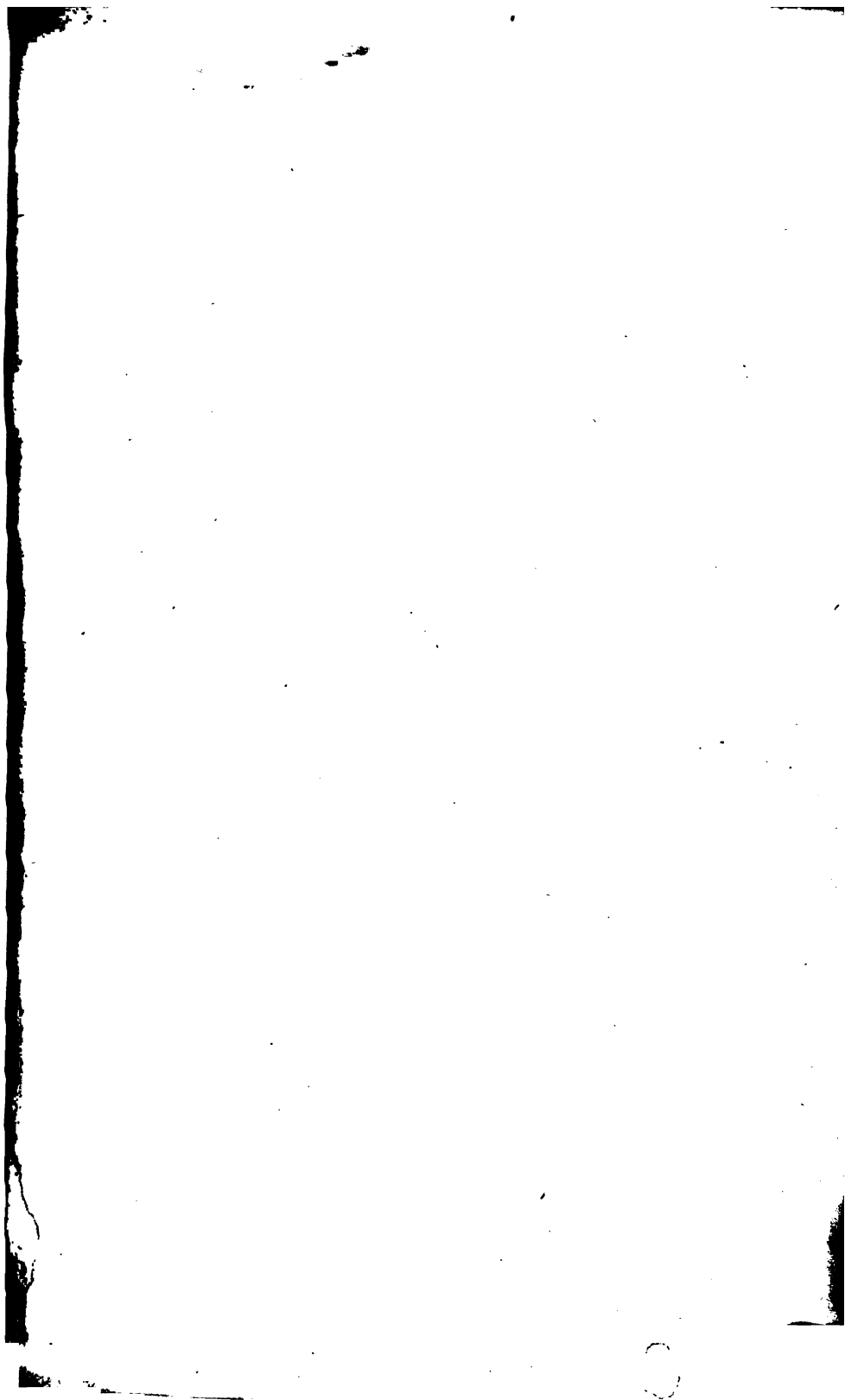
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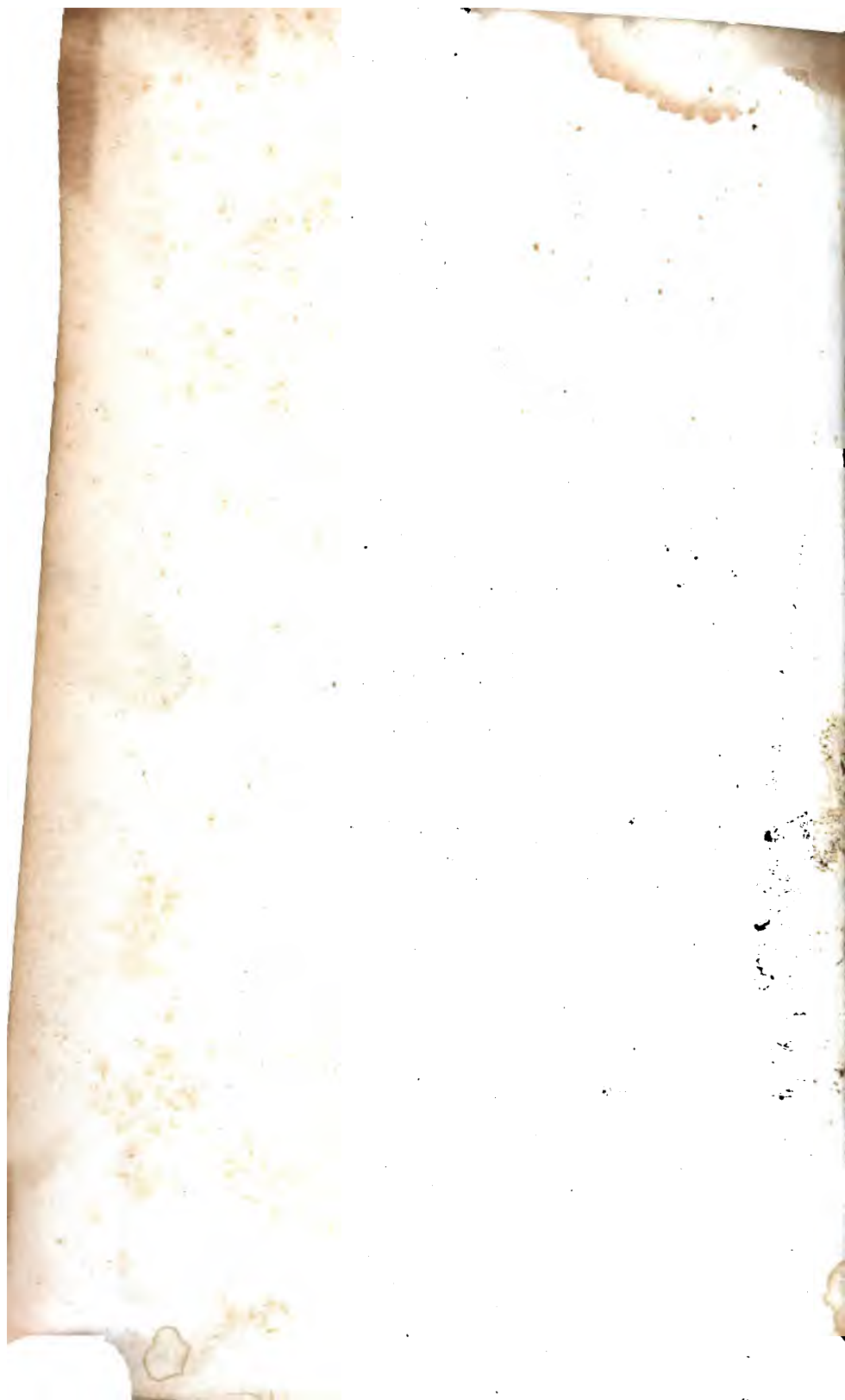
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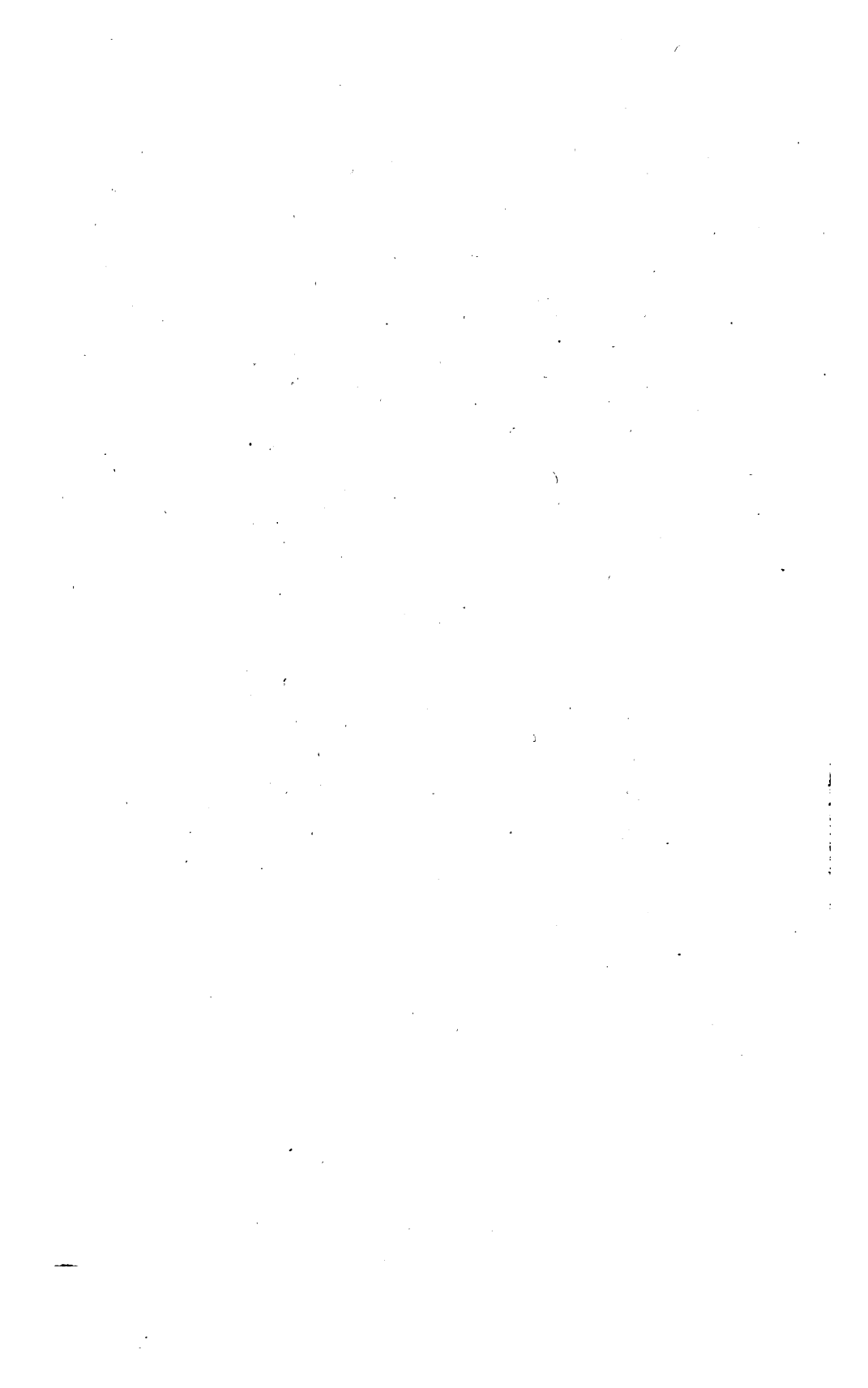
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